The role of selected international agencies in the formation of international energy law and policy towards sustainable development

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This Paper examines the development, role and operation of the major international agencies responsible for the development of energy law and policy, namely OPEC, IEA, Energy Charter Conference and Secretariat, IAEA, United Nations and its agencies, OECD Nuclear Energy Agency, and the European Union. Particular emphasis is placed on the role and effectiveness of each organization in promoting sustainable development. As a former UN civil servant, the writer is in a unique position to evaluate where weaknesses exist. He offers his own views as to the type of reforms, both political, economic and legal, which will be necessary to promote sustainable development to its maximum potential.

1 Introduction

The concept of sustainable development now dominates the natural resources, energy and environmental discourse with its accommodating notion of developing in the present while not compromising the future. However, sustainable development suffers from an imbalance: rhetoric overwhelms action; affirmation of moral values overwhelms implementation; having good intentions prevails over getting good results. Results can only be achieved if the "game" is properly understood: the context of the action, including the economic, social and cultural elements of the relevant environment; the concepts, usually culturally formed in some relationship with the – often historical and now obsolete – economic and technical context; the role, parameters of action, interests, and dominant perception of the main players.

While sustainable development can perhaps be described as the ideological input, activities such as technical and financial assistance and work with rules (formulating, implementing, revising) are the output of international agencies. This output is one of the factors which determines if, how and to what extent and in what shape and form sustainable development leaves the realm of morality and ideology and enters the realm of socio-economic and organizational reality. Very little practical research seems to have been done on how international agencies participate in the emergence of rule systems in the field of energy. This Paper is meant to sketch out observations on the role of selected key international agencies in the field of energy law (policies and regulation). The outcome of the Paper should help to understand, somewhat better than before, how sustainable development can be achieved more effectively through the activities of international agencies in the energy sector. The emphasis in this Paper is not only on the formal mandates – popular in the examination of international organizations by public international lawyers, but also and perhaps with greater emphasis on the "real-life" operations and strategies pursued by such agencies. The first is easy to do – all that is necessary is to look at constitutional documentation and periodic official reports; the latter is much more difficult and can not be done without involving considerable speculation, value-judgement and the uncertainties of looking behind the veil of officialdom and of trying to uncover the difference between what the agency says it is about and it does – the pretence – and what it "really" is about and does. Since this effort is more ambitious and backed-up by much less objective information and documentation, it is necessarily more ambiguous and leaves much more space for protestation.

International organizations play a central role in the emergence of international energy law. They represent a response to the globalisation of the regulatory challenges. As national regulation loses its grip, international agencies emerge to mirror the global scope of action of relevant actors – multinational companies, banks, non-state actors, criminal groups, but also the global scope of problems – transboundary environmental impact, need to create more level playing fields for competition in global trade, development and

[1] This Paper is a preliminary result of a more comprehensive project dealing with international energy law and policy. The author has received comments on all the international agencies from former or present staff of these agencies; their contribution is gratefully acknowledged, but needs to remain confidential. Helpful comments were also received from Dr Desta (CEPMLP/Dundee) and Dr Al-Hajji, Iowa. Another preliminary part of the project – on "International Energy Law: An Introduction to Modern Concepts, Context, Policy and Players" – was recently published in the Schneider and Theobald (eds), *Handbuch zum Recht der Energiewirtschaft*, 2002.

administration of a system of global legal disciplines to ensure the wealth-creating machine of the global economy can function properly, including its social safeguard. One could qualify the role of international agencies in this sense as "collaborative international regulation;" it is rare that governments yield all or even a substantial portion of their regulatory jurisdiction to international agencies, except where inevitable, and even then with safeguards. The much more homogeneous and integrated European Union's relation with its member states – and the well-known British reluctance to yield sovereignty – is a good example.

International agencies in this area are therefore more a prototype of true international regulation; they help its member states to regulate better by providing model guidelines, collective and better regulatory intelligence and a forum of dialogue and collegiality.[2] As we shall see, they are primarily intergovernmental collegial networks. This, in turn, helps national regulation to be more aligned with each other. National administrations usually establish formal and informal channels for collaboration as part of their participation in international agency activities (conferences, workshops, elaboration of model codes).

There is an explicit, visible role of international agencies in the regulatory process – servicing the negotiation and administration of treaties, formal elaboration of standards and guidelines and, though rarely, direct regulatory power. Elaborating technical standards, usually in collaboration with experts in governments, companies and industry associations, is a latent, but key, direct regulatory role.[3] Such standards may be directly binding, but in most cases they have an indirect legal effect: as standards of due diligence for defining civil responsibility, by explicit incorporation into contracts or by reference in national or international (e.g. GATT/WTO-based) law. They also work by providing national governments – and domestic experts and social forces – with a ready-made set of usually well-researched, tested and often elsewhere applied rules. These possess the political and technical legitimacy pertaining to "authoritative" international standards. Standards by the IMO for offshore pollution and dumping, by the IAEA for nuclear safety of facilities and transport, by the OECD on good conduct by multinational companies, by the World Bank on environmental assessment of lending projects, by UNCITRAL on infrastructure concession contracts, by the UN on environmental considerations in mining or by non-governmental organizations such as the Institute of Petroleum or the American Petroleum Institute on safety and environmental best practices of oil and gas operations are in many ways the most significant rules applicable in the respective industries. Their "legal" nature is often not immediately apparent; the fact that they are usually not produced by lawyers, but by engineers should not blind the analyst from their significance.

But international organizations also have an implicit, informal and less visible role: serving as a forum for discussion, an actor (often with some autonomy and independent dynamics) with agenda-setting power, international agencies also provide legitimacy and a benchmark for national regulatory action. There is a feedback process between the national level, the NGO and business level, the authoritative media (foremost the Financial Times) and the international level. Innovations and new concepts jump from the domestic level to the international agency level. They are here processed, refined and negotiated into a more universally accepted format. They then leapfrog by way of an agency endorsement to the level of national regulation.[4] At times, international agencies acquire true international regulatory competencies. The EU is the best example. The new EU energy law emerging out of the 1996/98 electricity and gas directives and its current amendment proposals illustrates the balance between true EU Commission powers and national regulatory powers to be exercised within the EU energy law framework. The more technical the subject and the more homogeneous the membership, the more it is likely that international agencies obtain true and direct regulatory powers, often exercised jointly with national enforcement authorities. IMO, WIPO and other specialised agencies illustrate this angle. Here, there are superior technical and efficiency reasons for transferring direct regulatory powers, and less "sovereignty" reasons related to more politicised issues for keeping such power at home.

International agencies serve as vehicles for transnational coalitions[5] to impose or influence by persuasion of national regulation, usually to counter the stronger influence of domestic pressure groups (protectionist

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2 J. Weiler, "The Rule of Lawyers and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35 *J. World Trade* 191.

3 *See* forthcoming article by A. Wawryk, 20 *JENRL* (2002), on international environmental standards in the oil industry: Improving the Operations of Transnational Oil Companies in Emerging Economies.

4 I have explained this process in the international petroleum law field, in N. Beredjick, T. Wälde, *Petroleum Investment Policies in Developing Countries* (1987).

5 E.g. national ministry, international business associations and international agency officials and their expert networks or, with a similar structure, national environment agencies, international NGOs and the environmental agency network. On the competition of such transnational constituencies, see T. Wälde, "Sustainable Development and the 1994 Energy Charter Treaty: between Pseudo-Action and the Management of Environmental Investment Risk", in F. Weiss *et al.*, (eds), *International Economic Law with a Human Face* (1998), at 223–271.

business or labour lobbies, ideological pressure groups).[6] The agency, with its experts, funds and machinery for consultancy work, meetings and publications, serves as forum for the elaboration of common rules by such specialized communities. The national representatives then return to their domestic regulatory process with the added legitimacy and technical and informational underpinning gained in the international agency process. The international agency, so to speak, is the nest to which and from where "birds of the same feather" fly into their domestic political and regulatory context. This leads to another non-conventional observation.

One generally ignored quality of international agencies is their scapegoat role for domestic politics. There is nothing more convenient than putting the blame and political responsibility for necessary action which is strongly contested by vociferous interest groups, on international agencies and international obligations. The EU is the perfect example of national civil servants negotiating a regulatory agenda with the EU Commission staff. National politicians then blame an external and therefore intrinsically unpopular organization for the result they have all designed jointly. The current politicization of the most visible international agencies (World Bank, IMF, WTO, OECD) resulting in agitation by the inchoate and disparate forces of the anti-globalization movements is a consequence of governments re-directing protest to faceless international agencies. In fact, national governments often encourage and later sympathetically take up such protest, to the extent it serves their interest in gaining legitimacy and public opinion support. In consequence, such international agencies have to engage in a political, not only technical dialogue with non-governmental forces. This is likely to lead to a further weakening of nation states and to more "real" power and legitimacy than the currently only apparent power of international organizations. The anti-globalization onslaught on the "pretend" power of international agencies may therefore result in the end in real power. International agencies are therefore in the midst of globalization: proto-regulators of the global economy, they become the target of the anti-globalization protest. They will in turn become politicized actors in global media campaigns, rather than just acting as the "servants" deriving funds, power and legitimacy from the members of the "nation states club."

The primary and traditional function of international agencies is to provide the secretariat services for conferences out of which emerge regulatory instruments such as multilateral treaties. The WTO services the GATT-related treaties (and subsidiary instruments such as protocols and understandings), the Energy Charter Secretariat, the protocols and decisions of the Energy Charter Conference and IMO for various offshore pollution and dumping protocols. International agencies always proclaim that they are mere "servants" of the governments meeting in conference. This is an essential element of the official self-presentation. They will use such defence in particular when attacked by outside forces (press, NGOs) for disliked treaties, treaty administration and their mandate-based activities. This is formally correct: intergovernmental organizations consist of a "secretariat" providing faceless "clerical" services to their governmental masters: preparing studies, conferences services, support of negotiations, reports on implementation. Formal decision powers, treaty-making and the making of subsidiary law under treaties rests as a rule with the conferences or governing bodies composed of government representatives – economic ministry delegates in the case of the OECD, finance ministry delegates in the case of the World Bank (here acting through the World Bank executive directors), environmental ministry delegates in UNEP and so on.

This view of the role of the organization is usually described in the charters and other legislative documents setting up the organization. But such defensive escape into anonymity, while formally correct, also intentionally ignores the reality. An international organization, while professing to be only the servant of its governmental masters, develops within a short while a life, interests, external constituencies and an organizational dynamic of its own. Pure formal descriptions focusing on founding instruments and organizational self-representation are therefore unable to capture the reality of an international agency and its role in the evolution of energy law. International agencies foremost develop a corporate self-interest in perpetuating themselves, even when their original purpose has evaporated. Since they are usually not set up with explicit "sunset" clauses, i.e. a finite end, like a task force, they will continue to exist even when the original purpose no longer exists nor requires the organization's continued existence. International agencies will therefore work hard at pretending that the original purposes still exist and are valid – and justify the considerable expense, usually by membership fees, to maintain them. They will in addition adapt to respond to issues they see as suitable for their survival. The fact that international agencies leap like lemmings, usually all together,

6 An excellent analysis of the bargaining dynamics: R. Putnam, "Diplomacy and Domestic Politics: The logic of Two-Level Games" (1988) 42 *International Organization* 427.

after the most recent fad,[7] reflects this survival instinct. A study of the self-justifications of agencies would lead to the identification of a "life cycle" of fashionable terms, with innovation, reluctance, gradual acceptance, enthusiastic pursuit, widespread use, and finally obsolescence and quiet disappearance.

But agencies dispose of a potent arsenal of instruments for self-perpetuation. They do not rely on the cyclical appearance and fade-out of lead paradigms, but rather exploit this cycle for their own benefit. They have resources to buy-in the support of external constituencies, usually in some sort of patronage: consultancy assignments for people linked to diplomats on their governing boards, senior executive roles for former diplomats or their friends and allies. The fact that senior officers of an agency usually and predominantly are not recruited by an open and transparent international recruitment process, but by the secondment of staff from ministries and in particular their governing boards indicates this symbiosis between the agency and the national ministries associated with it. This transnational alliance then persuades comparatively under-informed governments of the need to continue to pay for them. They have significant power to set the agenda of meetings since their staff will become more expert, with more time and resources (e.g. consultancies) than available to most government delegates. There are always informal linkages between secretariat staff and delegates with ambition and a purpose. Many organizational actions spring out of such informal alliances.[8]

International agencies will develop constituencies – in more euphemistic language "stakeholders", e.g. environmental ministry delegates, academic experts, consultants, environmental NGOs which will support its continuous existence – and the need to fund them. Since few if any agencies are subject to an independent assessment to gauge the continuing need for them, they are very hard to eradicate once established. Most informed assessment is partisan and a non-partisan assessment is usually un-informed since without access and resources for an in-depth assessment. To develop a proper understanding of the role of international agencies is therefore quite difficult, if not impossible. One can understand why most of the international law literature does little more than regurgitate statutory instruments and corporate propaganda rather than at least attempting an independent examination with the aim of at least coming closer to an image of reality.

The work of international agencies is closely related to the functioning of efficient regional and global energy markets. Only the market mechanism can unleash the human forces of innovation and efficiency. The market mechanism has, if left to its own devices, shortcomings – externalities, public goods, excessive volatility. The task of regulation, and therefore, for regional and global markets, of the proto-regulatory functions of international agencies, is to deal with these deficiencies, i.e. to strengthen the effective functioning of international energy markets, internalise externalities, take care of truly "public goods" and smooth out – to the extent feasible – excessive volatility. There is an ever-present risk of over-regulation: "state failure" is the other side of market failure. Over-regulation imposes excessive transaction costs, prevents innovation and thus damages the capacity of society to both create economic and technological resources to deal with the challenges of sustainable development. In international organizations, the risk of preferring state-led solutions is greater than in a national regulator: the international agency is twice removed from democratic legitimization, almost fully removed from the pressure of competitive markets and interacts mainly with like-minded constituencies – i.e. governmental delegates, NGOs and agency-selected experts with a natural pro-agency and usually pro-regulatory bias. This inherent weakness of international organizations is to some extent mitigated by the reduced effectiveness of their action, in particularly of the mainly "talk-shop" organizations.

In the remainder of this Paper, we will review relevant international agencies, with comments on their role and function. Due to space constraints, only the international agencies of most significance for energy will be discussed.

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7 I have worked in and with international economic organisations since 1996. I have observed a continued "product cycle" of "lead concepts": basic needs, transfer of technology, self-reliance, the role of women in development, institutional reform, good governance, eradication of poverty have succeeded themselves as the lead paradigm in a usually 5–7 year period, with some lead concepts (e.g. basic needs) now returning under a different label ("eradication of poverty"). The risk for sustainable development is that it might suffer the in-built obsolescence of a lead paradigm. There is a regular sequence of "concept cycle" phases: disregard of minority criticism, gradual acceptance, acquisition of the pole position by the development community, widespread "mantra"-like use and repetition resulting in increasingly voiding of substantive content; criticism of inherent contradictions and hypocrisy, gradual fade-out from general use and finally deposition into the "old ideas" archive.

8 As a UN civil servant, I regularly drafted the resolutions to give us work and a mandate for funding together with sympathetic delegates with an institutional or personal interest in the follow-up activities. That seems to be the rule throughout the international agency world.

2 Organization of Petroleum Exporting Countries (OPEC)

If one tries to deal with truly "international" energy law, OPEC is the international organization with the greatest impact on the oil sector, but also with influence on energy and energy-related environmental questions, and not only on production and trade, but also on investment. OPEC countries currently control about 75% of the world's oil reserves and 40% of oil production. What is more, most of low-cost oil is produced by OPEC countries. This means that a prolonged slump in prices will tend to enhance these market shares.[9] High-cost producers also tend to deplete their reserves much more rapidly. This means that the lower the price, the greater the subsequent enhancement of future OPEC's market share.

The suppression of the existence of OPEC that one finds in Western international law literature reflects a Euro- or US-centric perspective. OPEC is an actor that does not fit well into a traditional perspective given that it has been seen, since the 1970s, as at least co-responsible for high oil prices, nor into the modern "green" perspective since it pushes, naturally, for hydrocarbon consumption. The fact that a high oil price has as much of an energy-efficiency impact as most other measures undertaken by Western governments does not help – it is a high oil price imposed by the interest of producing countries and not, as the EU large gasoline excise taxes, for, at least ostensibly, environmental reasons. It also does not fit into the mind-set of Western NGOs: OPEC does not conform with the dominant view of developing countries as victims and passive beneficiaries in need of high-minded Western support and guidance, but it is rather an independent actor outside Western control. It is also barely, if at all, the object of NGO attention or exposed to NGO pressure. NGOs play virtually no role in the political systems of almost all OPEC countries.

In the 1970s, OPEC was viewed with great hostility (including US calls for "resource wars") as it seemed to set up a dependence of Western countries on a group of developing countries – which is counter to the situation seen as normal. OPEC still carries the image of the 1970s with Sheiks swimming in petrodollars. But, apart from Qatar, UAE and Kuwait, OPEC countries are much closer in their socio-economic make-up to developing countries. It was also seen in Western countries, particularly in the US, as threatening the high standard of living, which is largely based on comparatively high per capita hydrocarbon consumption. OPEC, I suggest, is currently the one global force which keeps the US and European petroleum production, its industry and its companies, alive and in healthy profit. This fact is counter-intuitive and counter to the standard reference to the "OPEC cartel". It facilitates worldwide adaptation of companies' production to demand, thus smoothing destabilizing price cycles; it also makes addition of new capacity, with its de-stabilizing influence on the normal price cycle of this commodity, more difficult by restricting access to acreage for new oil development.[10] In other words, it carries out the functions of the corporate petroleum cartels – then supported by their governments – of the past. In addition, by working against a fall of prices to their marginal cost, OPEC's effects are the equivalent of adding the ideal climate-change tax on hydrocarbon consumption. Restriction of investment in OPEC countries – basically for production likely to exceed the present and perhaps expected future quota – has an effect of supply restriction, again something that environmental groups opposed to oil have called for. Multinational companies and environmental groups are thus the silent partners of OPEC, though still quite unconscious of this and mostly trapped in the frame of mind of the 1970s. The only divisive issue of substance at this time is, as is normal, the division of spoils. The main cost of OPEC falls on consumers. Though, arguably, its pricing strategy – well beyond marginal production cost – also means greater security of supply as otherwise uneconomic reserves, as a rule outside OPEC countries, have been developed. Without OPEC, the only reserves worth developing would be those low-cost reserves, mainly in a very few countries in the Middle East.

OPEC was founded in the 1960s through a Venezuelan-Saudi initiative to reduce dependence on the international oil companies.[11] At the root of OPEC's formation were pricing disputes with the companies and US import restrictions. The main objective was to establish a common front vis-à-vis the oil companies with respect to several fiscal issues ("expensing royalties" in lieu of crediting them against tax; calculation of the proper reference price for oil taxes and royalties). Its objectives evolved in the 1960s in response to US government and oil company action moving gradually from a focus on tax matters to oil pricing. First, a developing country producers' association to develop links, information and discussion, it supported the efforts of major producing countries in the 1960s and 1970s (Iran, Gulf countries, Venezuela) to take over foreign-owned operations and set prices. OPEC Resolution XVI.90 of 1968 formulates a common agenda and

9 Low oil prices will also tend to increase the efficiency in high-cost areas (e.g. North Sea). Significant results in terms of lowering production cost have been achieved, e.g. by the UK CRINE initiative. This incentive for efficiency is not present in the Middle Eastern low-cost producers. But the difference between, say, North Sea and Saudi production cost is still very large.

10 B. Mommer, *Global Oil and the Nation State*, 2002, develops this as an implicit function of OPEC since the 1970s.

11 P. Stevens, *Oil and Gas Dictionary* (1988), 138–140; L. Lugo, *The Amazing Story of OPEC* (1997).

the legal position of producing countries.[12] This crucial, now quite dated, resolution also expresses explicitly the otherwise implicit OPEC policies restricting acreage access by the international oil companies; the principle is still alive in the Middle East, but has been disregarded in Indonesia, Venezuela and Nigeria. In terms of impact on international law, that was perhaps the period of the major impact: OPEC's position was fully aligned with the then prevailing "Third World" claim for a "New International Economic Order" with "Permanent Sovereignty over Natural Resources" and exclusive jurisdiction over foreign investment, including the right to nationalize. OPEC's then success fed directly into the formulation of the NIEO-resolutions of the UN General Assembly, and those in turn provided and amplified legitimacy to OPEC actions – without much attention paid to the fact that the increase of the oil prices then affected developing countries most.[13]

Similarly, much of the Western strong and instinctive opposition to the NIEO concept was based on the fear of being at the mercy of the oil producers grouped in OPEC, a fear that, with the NIEO being buried, energy of more plentiful and supply of more diversified, is hard to appreciate in times of oversupply and low prices. This fear, naturally, recurs in times of tight supply and high prices, and in particular if there are concerns over politically (or now religiously) motivated supply disruptions. In the 1970s, US academics and international relations specialists openly suggested the legitimacy of a "resource war" to secure oil supplies from recalcitrant suppliers. No account was taken of the much higher energy consumption per capita in Western countries, in particular the US. It was a kind of sacrosanct right to energy supplies from wherever energy resources were located then prevailed.

With most of the upstream oil and gas reserves and production in the hands of producing countries' state enterprises by 1980, OPEC became the forum for dialogue, and sometimes collective action, by its members. While the very early days of OPEC focused on royalty/tax questions, by the 1970s the focus was price setting. This was later replaced by the use of production quota for each country. The intention then was that through the change of the production quota in response to market conditions, prices within desired price bands could be achieved. With oil revenues dramatically increased after 1973 and again 1981, it set up the OPEC Special Fund for development aid.

OPEC was seen as a threatening "cartel" in the 1970s when it tried to set prices, but it is not clear if market conditions and actions by the major producing countries (in particular Saudi Arabia) or OPEC as a common voice of the producing countries were the real cause. The view of OPEC has largely mirrored the ups and downs of oil prices: a threatening cartel in the 1970s and early 1980s, it became a "paper tiger" and mere façade for Saudi policies after the oil price declines in 1985 and again in 1998.[14] When quota discipline did seem to stick again in 2000, to the US it was again viewed as an illegal cartel. OPEC did move closer to the image of a conventional cartel in the 1980s when it set production quotas for its members. These failed to a large extent due to lack of discipline, but the severe collapse of oil prices in 1985 and again in 1998 seems to have persuaded its members (and significant non-members such as Russia, Oman, Norway, Mexico and the US oil industry) that there is mutual overall benefit in the quite normal market logic to reduce production and capacity in a low-demand, low-price context, and increase it in a high-demand and high-price context. As of 2002, OPEC seems to have managed to respond, even if not perfectly and to all theoreticians' recipes, to oil price volatility by a corresponding adjustment of the OPEC member's quota.

OPEC is an international organization headquartered in Vienna with a staff of about 120 (with 25 senior professionals from member countries). The secretariat does not, unlike other international agencies, seem to have developed a major autonomous role. It is engaged in research, monitoring of market trends and technical preparation of the meetings of ministers. Attempts to acquire a larger role of its own seem to be regularly rebuffed by its members. The IEA, for example, born as a reaction to the formation of OPEC, has a much larger, much more serious and even more autonomous role and outreach. It has built up a reputation for high-level competence which is probably due to the autonomy given by its members and the emphasis on professional competence. An important part of OPEC's mandate is presenting OPEC's view to the public, and in particular developing informed response to the criticism of OPEC mainly in Western countries – a function of bundling the expertise in and for OPEC countries and providing an "OPEC view" to the world. But even so it seems that the major countries (in particular Saudi Arabia, able to rely on ARAMCO, the world's largest oil company) do not fully trust the OPEC secretariat, either with respect to sharing intelligence with it or using its

12 H. Zakaryia, quoted in: T. Wälde, "Revision of Transnational Investment Agreements" (1978) 10 *Lawyer of the Americas* 265.
13 T. Wälde, "Requiem for the New International Economic Order," in G. Hafner and G. Loibl (eds), *Festschrift fuer Ignaz Seidl-Hohenveldern* (1998); for this reason, the OPEC Fund for international development was set up.
14 V. Stagliano, "The Ghost of OPEC in Energy Security Policy," *Resources for the Future*, Spring 1995, No. 119, 6–9.

work, but operate their own oil market intelligence machinery. The use of OPEC by its member states is quite limited. Perhaps given the great differences among them (with nothing uniting them other than oil- dependence), OPEC member states seem to use OPEC much less for jointly building strategic expertise and negotiating capacity and for developing a professional network for intelligence, standard-setting and policy formulation than, for example, the much more homogeneous industrialized countries grouped in the IEA. The studies which are, at present, being carried out by the World Bank on petroleum revenue management, or work on petroleum law, contracts, taxation, safety regulation, environmental protection would constitute the natural mandate for an organization of oil producers. But member states seem to have preferred to limit their solidarity to the essential core – production and pricing policies, rather than build up OPEC as a common producing countries research, think-tank and standard-setting organization – as is the function of international agencies such as the OECD, IEA or NEA. It seems that the organization, including its system of decision-making, its mandate, its staffing and budget level are much in need of modernization to adapt to post-2000 globalization. This is a world that is very different from the confrontation with the "Seven Sisters" in 1959 which was at the root of OPEC's foundation. OPEC – or better its member states – would benefit from carrying systematic benchmarking of the structure, organization, recruitment and funding mechanisms in place in organisations such as the IEA.

The Secretary-General (mainly three years) as well as the post of Chair of the board of governors (one year, on alphabetic rotation) are filled in relatively short-term rotation. The principal organ is the Ministerial Conference; management is under the authority of the board of governors. Special issues (in particular monitoring of the oil price and production quotas) is handled by specialized ministerial committees. The Economic Commission reviews reports and is responsible for technical recommendations for the ministerial council. Its budget (1995) was about US$15 million. From all accounts, the organization seems to have little influence on the oil policy *per se*. There are little evidence that the secretariat brokers compromise in the typically very fractious dialogue. It is also hampered by the fact that more significant secretariat positions can only be filled by nationals from OPEC member states. Since OPEC has, in comparison to for example the IEA, a much smaller number of member states, this is one constraint (there are others) for its staff work. The pool of qualified professionals is therefore much smaller; as often in international agencies, member state influences play a large role in recruitment. Member state control over OPEC activities (including recruitment) reportedly goes much further than in other international organizations. This may be due, *inter alia*, to the small number of member states and the sensitivity of oil production to those states, but also to the prevailing culture of caution in the most influential member states. The fact that OPEC members are – apart from being major oil producers – much less culturally homogeneous than, say, the OECD and IEA, that may also be a hindrance to the full development of the inherent potential of OPEC's secretariat. It seems that OPEC does not grant to its staff the status of independent civil servants. While this principle is not always taken seriously in practice in other international organizations, it does help to establish a professional culture. Long-term, contractually tenured, international civil servants tend to develop an "esprit de corps" and identify rather with the organisation than their country of origin. Civil servants, on the other hand, which are appointed on relatively short- and fixed-term contracts on the recommendation of their sponsoring home governments, will naturally have their prime loyalty to the home government.

In spite of such constraints, OPEC has developed considerable expertise in the operation of petroleum markets, perhaps largely through links with the very large state oil companies in its member countries. It regularly publishes the OPEC Bulletin, the OPEC Review and the Monthly Oil Market Report; these bring together know-how, with the focus very much on authors from its member states. OPEC, as an international organization, constitutes, provides and services a forum for discussion and determination of concerted action by the member states. Such action consists, in the main, as of 2002, of production quotas per member State plus their adjustment in response to oil prices. Currently, OPEC pursues a policy of increasing production levels when prices over a period exceed a specified price band and lowering production levels when prices decline below the specified price band.[15]

OPEC's current role in the evolution of international energy law is marked by two key issues. First, the organisation was founded on producing countries' natural interest to increase and stabilise revenue, i.e. its "mineral rent" from its control over oil and gas resources. That is still its *raison d'être*. But there are tensions between short-term maximisation through price versus long-term strategies centred on market-share for OPEC oil and gas as against non-OPEC competitors and non-hydrocarbon alternatives. Here, there is a

15 *See* Farewell open letter by the then outgoing Secretary General Ali Rodriguez Araque, available from the OPEC website.

conflict between Western, in particular EU governments' high excise taxes and OPEC policy.[16] High excise taxes – up to four times or more the price of gasoline (e.g. UK) – have an environmental justification. They internalize external costs to the environment and by road traffic. But they are also a convenient cover for a large tax income to compensate for the more visible lowering of income tax rates. The OPEC-consuming country conflict is not about a higher price for petroleum-based energy, but rather about who gets most of it. The EU and the US have tried to deflect political blame for high gasoline prices on to OPEC. They have, however, not been ready to accept the OPEC interest in stabilized oil prices and a "fair" OPEC share of the mineral rent on a formal negotiating agenda. Second, OPEC is naturally disinclined to view favourably the curreny Western, especially EU government policy to use heavy pressure to move away from hydrocarbons in favour of renewable energy sources as this would devalue its reserves. But such policies could go hand in hand with a price- and production-based supply restriction.

Both sides however, producer and consumer states, have some commonalities: there is an interest in all states with substantial petroleum production (US, UK, non-OPEC producers) and exports to oil producers not to have the oil price decline as dramatically as it did in 1985 and 1998; the consequences are a deterioration of the position of high-cost, non-OPEC production as well as non-conventional energy, reduction of trade with OPEC countries due to their then abruptly collapsing purchasing power, disruptions in the world financial system, greater economic volatility and greater emission of greenhouse gases due to cheaper petroleum.[17] Volatile oil prices – the benchmark for all energy pricing – will undermine the economic viability of much of the current drives towards non-hydrocarbon, energy-efficient, and renewables-based energy scenario. Both groups may also have an interest in capping petroleum prices as this would lead to both inflation (a problem for consuming countries) and an accelerated substitution of petroleum (a problem for OPEC countries). In theory, there is accordingly a possible deal between consumers and producers to stabilise oil prices in an acceptable range, to reduce volatility of little interest to anyone but oil traders and include some sort of monetary coordination to make oil prices responsive to high-growth and recession situations. Such a negotiating agenda might also contain quid-pro-quos in the area of free access of oil and oil-based products to EU and US markets and some principles on sharing mineral rent (i.e. between consumer excise taxes and producer royalties).

Climate change itself is not a mid-term threat to OPEC countries if production (based on investment) is kept in balance with demand. The OPEC policy of implicitly keeping controls on investment and explicitly on production is quite compatible with the more extreme anti-hydrocarbon positions taken by NGOs such as Greenpeace: exiting from hydrocarbons by restricting supply. OPEC policy can be interpreted not only as a price stabilisation (increase) policy, but also as a conservation policy, in the sense of Art. XX of GATT. But current Western thinking is not favourable to the use of regulatory instruments (trade, investment and pricing rules) to smooth pricing volatility. The history of the largely failed commodity stabilization instruments of the 1970s and 1980s does not encourage new tinkering with similar instruments. Country-based income stabilization is another matter. In a volatile industry, it makes sense to skim off surplus in rich years and add to invested funds to add income in lean years. Many if not all OPEC and Western producing countries have developed different types of oil income funds (Alaska, Norway, Kuwait, Abu Dhabi, Venezuela). These are now proposed or established for new developing country producers.[18] In essence, income is stored away and made more difficult to access except in cases of emergency or severe budget pressures due to historically low oil prices. Such income stabilization may not make oil prices less volatile, but would make low price periods easier to suffer.

These are issues for an agenda of discussions between OPEC and the producer countries (with the IEA and the EU as the main interlocutors). Such a dialogue has been attempted in the 1980s and in a low-profile way again more recently.[19] But no prospect for more than consultation and information-exchange has emerged so far. While OPEC is currently the major international petroleum organization, it is neither a major influence in prospective negotiations with consumer states on oil price stabilization as yet, nor, apart from a critical role and observer role, in the Kyoto-based climate change negotiations. Perhaps, there is less of a role here for

16 OPEC estimates that the G7 nations in 1996 obtained oil tax incomes totalling US$270 billion, while OPEC petroleum export revenues were US$160 billion.

17 A. Alhajji, "What Have We Learnt from the Experience of Low Oil Prices," *OPEC Review*, Sept 2001, 193.

18 Norway, Alaska, Alberta, Kuwait, Oman, Venezuela, Colombia, Azerbaijan, Chad, Iran, UAE. Charles McPherson, of the World Bank, has written in 2001 a paper on Petroleum Revenue Management in Developing Countries: see http://www.worldbank.org/html/fpd/mining/news/conference/taxation/McPherson.pdf. The World Bank is engaged in a project on the use of oil revenues.

19 Saudi Arabia called in 2000 for the establishment of a permanent secretariat for the International Energy Forum. A Forum secretariat is now being established in Riyadh following a producer-consumer meeting in 2002 in Osaka.

formal international law, than for quiet diplomacy in significant bilateral relations (e.g. US – Saudi Arabia) impacting on national policies towards oil and gas. The Western world has largely tried to suppress the existence of OPEC psychologically or destroy it. US external energy policy since September 2001 is, at least implicitly, again attempting to free itself from its overwhelming and inevitable dependency on oil supplies from Saudi Arabia. Its newly emerging strategies – entente with Russia, building up the Kazakh producers, accelerated expansion in West Africa and attempt to distance Nigeria, Indonesia and Venezuela from OPEC, prospect of a regime-change in Iraq towards a more US friendly regime – follow the now 30-year-old tradition of anti-OPEC policies. I suggest that a policy of active and formal engagement with OPEC might be more fruitful. The lack of such an active engagement may be because both OPEC and the IEA, as organizations representing major producers and consumers, are in themselves weak, secretariat-like services without the ability to identify and strike major international deals.

The role of OPEC is also likely to come under scrutiny from WTO law; several OPEC members are now in the process of accession. GATT/WTO obligations do not apply to OPEC which is not a WTO member, but to its member states. Production quotas such as the ones currently used are "export quotas" under Art. XI of the GATT.[20] One justification may be under Art. XI (2(b) – measures "necessary for international marketing of commodities"; the next defence could be found in Art. XX and XXI of the GATT. The question is justifiability under Art. XX, mainly (g) – conservation of exhaustible natural resources or (h) – pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the WTO parties and not disapproved by them. Acceptance as a legitimate measure under an international commodity agreement might be one way, but it is unlikely that governments – without a comprehensive deal being struck with OPEC – would approve such arrangements at present. OPEC quotas are intended primarily to maintain and increase price levels. Do they have a conservation function? It is at present not a primary rationale for these measures, but it can be seen as a secondary justification. Conservation is certainly the effect of a higher price and government-induced limitation on production. But the condition is that such conservation measures must be equally applicable to domestic production. That this is done currently is questionable, but needs more in-depth investigation. OPEC countries would also rely on the national security exception (Art. XXI of the GATT); acceptance of this is far from certain, but the concept has been interpreted by major trading countries (US, EU) very widely. The dependency of OPEC countries on oil production, not comparable to the role of oil in other countries, would be an argument. GATT does not include any formal reference to "permanent sovereignty over natural resources" (GA Res. 1801 of 1962) or "energy sovereignty" (Art. 18 ECT). But this principle could be seen as controlling or at least influencing the interpretation of the national security and conservation exceptions (Art. XX of the GATT), either directly as customary international law or indirectly as a result of GATT interpretation for maximum compatibility with customary international law. Accession negotiations and conditions could carve out an exception for participation in OPEC export quota schemes.[21] However, accession to the WTO is now subject to increasingly restrictive conditions – getting into the club early means having to live with less such constraints. The WTO in 1948 may have been primarily about access to manufacturing goods, with little interest in energy security. But this has changed for the influential blocks in the WTO. There is and will be more and more of an effort to extract concessions favouring US and EU energy security concerns from the resource-owning countries requesting membership. For example, in the case of Russia the dual energy price (i.e. higher export price, lower domestic prices for both energy exports and pipeline tariffs) is currently a stumbling block (as is the prohibition on TRIMs). Nevertheless, the legal instruments for a "deal" are available – but it needs political will and some creativity to identify the contours of a deal that improves the situation of both sides.

Possible future membership of the OPEC countries in the Energy Charter Treaty[22] would raise the same questions as raised for the WTO as the ECT provides for non-GATT members' application of GATT provisions with some qualifications. Different from the GATT, however, the ECT, in Art. 18, explicitly recognises "Energy Sovereignty" and "the optimisation of (resource) recovery and the rate at which they may be depleted or otherwise exploited" (Art. 18(3)). Arguably, ECT membership therefore poses less problems for OPEC countries than the GATT (though the GATT/WTO includes several OPEC members and others in accession discussions, while the ECT does not). There may, however, be soft-law disciplines under the ECT

20 Very early GATT reports leave no doubt that export restrictions used to avoid price competition among exporters and maintain export prices are covered by Art. XI, GATT.

21 UAE, Nigeria, Qatar, Venezuela, Indonesia and Kuwait are WTO members; Algeria and Saudi Arabia are in accession negotiations; Iran and Libya's applications for accession are explicitly being blocked by the US; Iraq is not a member nor involved in accession discussions.

22 (1995) 34 *ILM* 360.

for "export taxes" on oil[23] and under Art. 6 (competition law) as well as Art. 5 (prohibition on TRIMs). Some of these issues could be solved through "Understandings" negotiated by countries requesting accession (or, in the case of Russia, before ratification). Such understandings could include a limitation or long transition process for the TRIMs obligation (Art. 5), a recognition of OPEC production control (limiting any argument about the competition law article 5), an understanding that the ECT does not affect issues that are controversial between the EU and energy exporters (e.g. Russia, Algeria) such as destination clauses and initial access to new infrastructure such as pipelines.

To sum up: OPEC, as an international organization and forum which facilitates coordination among the major oil and gas producing countries, is now increasingly pulled into the institutional structure of the global economy. There will have to be a give-and-take on both sides to conclude such integration successfully. Unlike the more hostile 1970s, OPEC currently fulfils invisible but important functions for both domestic producers and international oil companies by being the organization most keen to – and most capable of – stabilizing prices by helping producers to manage production. Whether this ability – which was not evident in the 1980s and 1990s – is maintained or, as happens with most cartels, will fade again, is outside our ability to forecast. Sustainable development requires greater application of energy efficiency, minimisation of emissions that are harmful for the global (and localized) climate and possibly restrictions on the supply, and use, of hydrocarbons. Such policies, eagerly pursued by NGOs and the EU, for example, are unlikely to succeed if proper account is not taken of OPEC, the major international agency of the major oil producing countries. This analysis suggests that there may be more compatibility that meets the eye or which is intuitively implicit in the conventional reference to the "OPEC cartel". We suggest that an overall deal is possible, but requires a more active and creative effort at identifying communities of interest and much stronger leadership in pursuing and negotiating them on both sides. An arrangement could require some concessions by OPEC in terms of managing the oil price as a contribution to a stabilizing world monetary policy (e.g. lower prices in a recession; higher in a boom). It would require better guarantees of security of supply to concerned parties (e.g. US, EU, China). Oil prices could also be linked to import prices for the producing countries. In exchange, there could be some examination of the very high excise taxes on gasoline and some other developed country policies affecting the producer states. A higher price for oil together with a discipline on supply could be in the interest of both the OPEC countries, the environmentalist community and consumer countries long-term interest in a stable and secure oil supply. An unfettered global oil market is probably not in the interest of anybody – contrary to recurrent allegations in particular in the US. An unfettered oil market without political influence never existed. It would drive down oil prices to very low levels, close down most non-OPEC production (including in the US), counter current Kyoto and energy efficiency objectives, discourage development of renewable energy and would very likely result in extreme swings in oil prices.

3 International Energy Agency (IEA)

The IEA in Paris is the Western response to OPEC, though to mention explicitly this reverse-mirror role seems to be taboo. It is the main international organization dealing with energy, though its mandate, membership and operations are very limited – essentially it is an intergovernmental energy policy institute for Western countries which also manages an emergency sharing system. Its importance also derives from the fact that there is no global intergovernmental energy agency. Quite likely, the division between the Western (IEA) and producer country world (OPEC) is the reason that there has not been enough political interest and effort to create a World Energy Agency (WEA). Existing international agencies with an energy mandate (UN, UNCTAD, UNEP, UNIDO, World Bank) would also see their turf threatened if a World Energy Agency were to be created and would seek to take on such mandates.

The IEA was founded in 1974 on a suggestion by Henry Kissinger made in 1973, i.e. at the height of the first oil crisis, sudden increase in oil prices and take-over of foreign-owned oil production by the producing countries. OPEC, whose existence was disregarded in the 1960s, came to be seen as the main instigator and a powerful cartel threatening western countries' – in particular the USA's – oil supply. The IEA was, and is, explicitly limited to western, that is most OECD countries.[24] South Korea, Hungary and the Czech Republic

23 Art. 29(4): states shall "endeavour" not to increase export levies.

24 Members, at present, include the EU countries (plus Hungary and Czech Republic), Turkey, the US, Japan, Canada, Australia, New Zealand and South Korea. The EU participates, but is not a member (though it could accede). Norway is member of the IEA, but not of the emergency system, based on a special agreement with the IEA.

have recently joined the IEA.[25] The IEA was not meant to be or become a universal energy organization. As with the EU (*infra*), there have been intermittent calls for a UN Energy Organization, most recently to be attached or within UNIDO, but these have so far come to nothing. The IEA's basic purpose was to develop a system of collective energy security mirroring the collective producer power embodied in OPEC, then at the height of its power. Such collective energy security operates through the continuing emergency sharing system administered by the IEA. This system was never put into operation, though that may have been close at the time of the first Gulf war in 1991.[26] The most significant supply disruptions in the EU came about not because of OPEC and Middle Eastern conflict, but because of resistance to another round in gasoline tax increases by the British and other EU governments in October 2000.

The IEA's *raison d'être* has therefore diversified away from its earlier focus – Western solidarity in the face of OPEC-faced threats, towards energy-focused research and market intelligence, i.e. the type of work that is also well carried out by academic institutions, consultancy and investment firms. The IEA advantage or difference is that it is publicly and internationally funded, and therefore with much more historical continuity, financial stability and less dependence on markets, clients and national budgeting processes than private or nationally based public energy research institutes. While still in charge of the OECD countries' energy sharing mechanism, it now fulfils a function of centralized research and intelligence quite similar to the role of national energy institutes or the pooled research and intelligence function of international business associations. Focused on something that is still seen as strategic, and insulated from the questioning of national agencies of that type by its character as an international organization, it may have to justify its continuing usefulness by defining more closely the "public good" it delivers and its distinctive comparative cost and quality advantage over private, more market-driven organizations.

The International Energy Programme of 1992 is the treaty constituting the IEA.[27] Membership is limited to OECD countries, but there is no automatic membership of OECD countries. Accession therefore requires a double hurdle – to the OECD and then to the IEA. The close-to-membership association agreement with Norway might, though, be a relatively simple way of proto-membership for non-IEA countries (if this was considered desirable). An IEA path towards a universal energy agency is therefore in all likelihood blocked; given the common economic and political orientation, one could advocate a link-up with the Energy Charter Conference, if the US were to join (see *infra*), but a full merger seems not to be on the cards as long as Russia and the other former Soviet countries are not OECD members. The IEA is open to membership by the European Community (Art. 72 of the IEP), but this has not happened as yet. The EU Commission participates in all meetings without voting rights. There seems to be a low-profile competition with the EU Commission. Decision-making by its governing board is mainly by majority voting, not by consensus as in the OECD. This should make the Agency able to act more rapidly, theoretically, in view of energy disruptions, which was the intention of a voting arrangement different from the OECD. Votes are weighted by pro-rata oil consumption highlighting the economic weight and role in emergency sharing.

The IEA is in a complex relationship with the OECD as an "autonomous agency" with its own Executive Director, its own budget (though formally integrated into the OECD budget) and governance process, with some integration into and use of OECD administrative services.[28] Funding is by membership contribution based on the OECD scale, plus voluntary, project-related contributions. The IEA has a separate division on "non-member countries" which is used for an energy policy dialogue, economic studies and joint research projects. A modest "global energy window" is thus open to the IEA via its "non-member" activities and structures. Unlike other national or international agencies (e.g. World Bank, UN, UNIDO, UNCTAD, IMF, IMO), the IEA seems not to have provided technical assistance (policy advice; legislative, tax and institutional reform; training; assessment of energy projects and programmes; privatization; investment promotion) in member or non-member countries. Given that the IEA has a large core of expertise, a comparative edge in its specialty field and an energy policy link with all the IEA and many non-IEA countries, that is regrettable. Energy assistance, when provided by other agencies (including the EU Commission) is never the central focus of expertise and interest and therefore often provided with rather uneven know-how. Member states must have preferred energy policy assistance to come through their bilateral aid agencies, perhaps with the idea of

25 There have been discussions with Mexico (which originally applied for membership). But in the meantime Mexico has withdrawn its application: J. Abramowski, "Mexican Energy Laws," (1995) 13 *JENRL* 29.

26 At the time of writing this paper, a second Gulf war looked likely. The IEA is again preparing plans to ready its emergency sharing system.

27 Its character as a proper international treaty independent from the OECD seems to have been questioned in bureaucratic turf battles with the OECD, but is strongly defended by the IEA.

28 The IEA is much more autonomous than the "Nuclear Agency," a part of the OECD proper.

gaining a competitive advantage for their own energy industries and consulting firms rather than providing regular programme funding for technical assistance to the IEA. Also, the IEA may have intentionally avoided vigorously seeking voluntary contributions which would have placed it in competition with most other international agencies. The rough-and-ready tumble of international aid competition does usually not sit easily with well-funded international organizations staffed by Western civil servants on secondment. The dual character – rarefied and rare emergency sharing here, intergovernmental research institute there – may also not sit easily with the competitive vigour required to develop a sizeable role in policy advice.

The traditional core of the IEA is its emergency oil sharing programme – now better described with the wider term "emergency response measures". It consists, first, of measures by member states to reduce demand and to maintain oil stocks at 90 days of net imports. If emergency situations for the whole IEA group occur (two levels of group shortage: a 7% and a 12% shortfall, to be determined by the IEA Executive Director), a rationing plan is triggered which also requires surplus countries to provide for imports into deficit countries. IEA-based oil companies may have to be directed by member states to re-order supplies. There is a regular coordination mechanism between the IEA and such oil companies. The trigger is an actual shortage – rather than a sudden price explosion, so that the mechanism is rather akin to a war-time international rationing plan than a market intervention mechanism. The distinction between the two is sometimes questioned. Price spikes can both indicate and cause a disruption of physical supplies and market intervention can help to manage scarcity situations. The US, for example, has been more interventionist in deploying their strategic reserve in high-price situations, e.g. in 2000/2001. With two more recent governing board decisions in 1984 and 1995, the flexibility of the IEA and the member states to respond in a coordinated fashion to pre- emergency situations was increased, basically by a consultation procedure leading to the use ("draw-down") of the oil stocks. None of these mechanisms has ever been activated, though the beginning of the Gulf war in 1991 led to calls to start at least with some use of oil stocks to calm markets. The relation of the IEA mechanisms to market developments (which can cause shortages as well) is not very clear. Presumably, the current concept is that action to reduce prices is not justified, but only to deal with significant physical shortages. But when market developments lead to physical shortages, the very presence of the IEA mechanisms and in more severe cases their activation should have an effect on the market. Responsiveness to the oil markets (both physical and forward plus paper-based) and management of physical shortages can therefore not be completely divorced from each other. The IEA members have been moving away from primary reliance on sharing. It has now become, in essence, a measure of last resort. The primary emphasis is on coordinated measures involving the timely draw-down of strategic stocks, supplemented by demand restraint, oil production and fuel-switching measures.[29] A new EU Communication[30] suggests: "As regards the IEA, the basic elements of the 1974 Treaty are no longer applied. Other provisions have been put in place, but these require the unanimity of the 26 participating countries. The mechanisms have become obsolete in as much as they provide for joint action only if there is a physical disruption of oil supply. There is no legal framework for the coordination of action in the event of a threat of a physical disruption which would increase oil prices beyond what is reasonable." The EU report furthermore highlights the absence of gas in the IEA emergency sharing system – in spite of gas having much greater significance than in the 1970s and the risks requiring consent from IEA member countries in a completely different situation than the EU.

Otherwise, and in view of the largely dormant character of the emergency programme, the IEA has become very much a collective study organisation for its members. There is regular reporting to enhance the transparency of oil markets; in-depth review of country energy policies – with recommendations, preparation of "outlooks" which provide national (and commercial) actors with some idea about the future of energy demand and supply and a formulation of "shared goals" which at present comprise liberalization of markets and environmental issues. The IEA is unlikely to take a position on implementation of the Kyoto Protocol to the UN Framework Convention on Climate Change as long as there is a strong divergence between the US (and most of its companies) and the EU (and its companies). Different from other more visible international agencies (e.g. the OECD with its failed effort to negotiate a multilateral agreement on investment; the WTO, World Bank and IMF with their exposure to the anti-globalization movement(s)), the IEA has so far escaped most public attention. This relative immunity, though, is also likely to make it less aware of non-governmental views and demands and less able to engage in a dialogue with them. Finally, the IEA provides an institutional vehicle for research in energy technology through, so far, over 40 collaboration agreements that it sponsors, including with non-member countries. There should be potential here to engage not only scientific and technological, but also more applied and policy-oriented technical assistance.

29 A comment from Mr Craig Bamberger, until 2001 the Legal Counsel of the IEA.

30 "Internal Energy Market: Commission Proposes Strengthening Security of Oil and Gas Supplies," 11 September 2002, at 4.

The IEA is in a curious situation. A child of the oil agitation of the 1970s, it may find itself in search of justification for its existence. With the realisation that the oil exporting states are much more dependent on export than the importing states, the fact that the emergency programme has so far never been activated, can be more easily explained. With oil itself declining in the energy mix – substituted in part by gas, and now, under the signs of Kyoto change, the new push towards renewable energy resources, its oil-focus risks obsolescence. Energy security is now no longer exclusively a matter of oil supply, but also of gas, coal, uranium and electricity supply. Energy security for the IEA member countries, in particular the EU, means a favourable investment situation in producing countries, favourable legal and institutional conditions for transport and transit of energy resources – and electricity – and physical infrastructure (plus a regulatory framework maximising its use) such as pipelines, interconnectors and storage facilities. While the IEA has dealt with such issues in various studies, it has no operational, or policy advisory role. Also, its character as a strictly Western, OECD-type of organisation may be in question as globalisation and the forces now triggered call rather for universal organisations, with an ability to conduct a global dialogue with all relevant stakeholders, conduct globally focused research and prepare globally relevant policy studies corresponding in coverage with the globalisation of energy markets. This has been brought home starkly to the OECD when it tried to negotiate (in its club atmosphere) a multilateral investment code that was mainly relevant and intended to be ultimately applied to non-OECD countries.[31]

There does seem to be a need for a truly universal energy agency, as energy continues to be the mainstay of the global economy. One way would be to maintain the emergency sharing system of oil, but to expand the organisation's focus on all energy sources, expand membership (perhaps in associate form) to all countries wishing to join and put more emphasis on developing energy-related technical assistance. The IEA's non-member countries and its research contract areas would seem to provide a nucleus for such expansion. One might envisage an IEA consisting of two components – an emergency-sharing, OECD-based side and a universal, all-energy-based side. This could be developed gradually, and might emerge over time anyway, but it would also make sense to consider amending the IEA Agreement to provide for formal associate membership to non-OECD countries. In terms of influence on international energy law, the IEA's contribution has been mainly the emergency-sharing system as a free-standing element. IEA studies – generally of high quality, often prepared by seconded government and industry staff – will have an influence on policy-making by accentuating policy shifts (as presently towards liberalisation and environmental mechanisms), but there is little direct influence on national energy law reform – as, for example, through bilateral or World Bank and UN technical assistance – nor has the IEA so far played a visible role in the evolving WTO-, NAFTA- or EU-based trade law of energy nor in the many environmental treaties, protocols and guidelines now emerging.

With or without the IEA, my policy recommendation is for a truly global World Energy Agency (WEA). The energy industries are coalescing into a truly globalized industry. This means there is a need for the research institute-type of work of the IEA, the market stabilizing influence of OPEC and the proto-regulatory work of the OECD, but involving, on an equal level, all stakeholders, both governments, companies (for example in the way they are involved in the ILO procedures), other international agencies (IEA, OPEC, OECD, WB, UN agencies) and non-state actors such as industry, professional associations and NGOs. As the EU Commission recently noted, energy in developing countries is "an orphan without a parent international organisation."[32] There is currently no push for such an organization and nobody with the authority of Henry Kissinger to advocate its establishment. Most other agencies involved in energy would be jealous for turf and competitive reasons. But the interesting challenge to create such a new international energy organization would be to identify an organizational design that does justice to the much greater role of non-state actors (companies, associations and NGOs). A modern WEA would embody and institutionalize the modern ways of stakeholder consultation now being designed and employed.[33] The EU Commission has raised in a quite oblique way the need for a WEA. It might be a comparatively well placed international organization to promote it, in particular since it has probably the best ability to speak with every significant stakeholder, including OPEC and the OPEC countries, Russia, the increasingly significant Asian consumers (India, China), the US and "civil society." Much of the current mandate, activities and staff of the IEA, the ECT Secretariat (*infra*), the energy activities of the World Bank and the UN, but also a part of the research and

31 D. Henderson, *The MAI Affair: A Story and its Lessons* (1999); P. Sauve, "Scaling Back Ambitions on Investment Rule-Making at the WTO" (2001) 2 *J. World Investment* 529.

32 EU Com, 17.7.2002 at 5, *supra*.

33 E.g. the Global Mining Initiative which led to the MMSD project (www.iied.org), a global stakeholder consultation process funded, in this case, by the industry.

dialogue activities of OPEC, could be consolidated into the proposed WEA. Such modernization of the international institutional set-up for energy policy would evidently have to strengthen, both in content, linkages and name, the incorporation of sustainable development.

4 Energy Charter Conference and Secretariat

The Energy Charter Conference, served by its Secretariat, is the most recent addition to specialized, energy-focused international organizations. It is based on the Energy Charter Treaty[34] (with a headquarters agreement with Belgium), and has the formal status of an international organization. The Secretariat services the negotiations for secondary and follow-up instruments (protocols) and supports treaty implementation. The ECT is an energy-focused treaty with all European countries, the states of the former USSR, plus Australia and Japan as members.[35] The treaty deals mainly with investment protection (in the style of modern bilateral investment treaties) and with trade (adopting WTO rules for energy trade between states where at least one is not a WTO member (that is now mainly Russia, Ukraine and the Asian countries of the former USSR). The ECT also deals with transit in a novel way.

The main activities of the Conference/Secretariat are at this time the elaboration of a transit protocol providing more specifics to the more general Art. 7 of ECT. A supplementary treaty to provide legally binding and specific rules for access for foreign investors ("pre-investment") was supposed to be negotiated when the ECT was signed in 1994. Negotiations took place between 1995–1998. Their final conclusion depends on the resolution of a number of outstanding political issues. The political interest in the supplementary treaty seems to have expired. There was also resistance, reportedly mainly from France and the EU. The interest in expanding investment arbitration (available under Art. 26 of the ECT) may also have waned as the full potential of investment arbitration, in particular under the NAFTA, has become clear.

The trade part of the Treaty is losing significance, as most East European countries are about to join the WTO. It is, for example, still relevant for the issue of energy import restrictions now being imposed by EU countries (in particular Germany and Austria) on nuclear-based electricity to the extent such restrictions would affect non-WTO members (e.g. Russia or Ukraine).

The ECT – different from the quite similar in content MAI (Multilateral Agreement on Investment) (*supra*) – has not been politically very visible. As a result, the treaty – and the ECT organisation – have been spared NGO onslaught. As in the IEA case, that has also compelled them less than the large international organisation to engage in a dialogue with non-governmental voices. The ECT's future lies mainly in securing its current membership through ratification by Russia (which seems possible), extending its membership to other Asian and Mediterranean countries, and serving at least as a model for regional energy relations in Asia (APEC), Latin America and Africa. The strength of the treaty and the justification for a permanent secretariat will also depend on the respect for the treaty's investment protection, and here mainly in the higher-risk former USSR countries. But the secretariat's role in getting such respect is limited, though the Secretary-General has a role under Art. 7 in particular for appointing a conciliator with provisional decision-making powers in case of transit disputes.

The staff of the ECT is quite small (under 30) and it has at this time no substantial budget for extra-curricular activities, e.g. studies and country reports like the IEA or technical assistance like the UN and World Bank. EU technical assistance has, though, at times supported ECT implementation projects. The Energy Charter Secretariat sits not too comfortably between the EU Commission (both are located in Brussels) and the IEA in Paris. Formally, the EU Commission has no particular role in the EC Secretariat; the EC is one of the 52 members. But politically and financially the EU in its entirety is the main sponsor of the ECT. The absence of the US reinforces this role.

The ECT is one of several privileged dialogue facilities between Europe and the former Soviet Union, though for East European countries the ECT will decline in significance as accession to the EU, and thereby full adoption of the energy "acquis communautaire", has acquired priority. But for the EU and the Commission in particular, it does not seem clear whether they wish to use the ECT machinery, or its internal instruments for creating a legal and institutional framework facilitating trade and investment with its major energy partners. Several EC initiatives – e.g. the Inogate energy transit project – seem to overlap, duplicate or

34 (1995) 34 *ILM* 360.

35 US and Canada have signed the 1991 precursor European Energy Charter, but not the 1994 Energy Charter Treaty. China and Saudi Arabia have acquired observer status; several Mediterranean countries are considering the possibility of accession.

compete with the ECT transit protocol effort. Similarly, instruments of EU external energy policy – such as association, partnership and cooperation agreements and the Lome/now Cotonou agreements – could substitute for work through the ECT.

In terms of influencing non-OECD countries – transition and developing economies – towards market-economy models for organizing the energy sector, the EC Secretariat/Conference overlaps with much larger organizations such as the EU, the World Bank and the non-member activities of the IEA. If the US were part of the ECT, one could argue for much more collaboration, up to merger, between the EC Secretariat/ Conference and the IEA. If, on the other hand, Russia were to formally ratify the ECT and other countries were to accede, the ECT could become either a major channel of EU dialogue with energy producers around the world (including OPEC countries) or, alternatively, a jointly "owned" and therefore more equal organisation for regulating their economic relationship, rather than the more one-sided reliance on EC agreements.

The ECT and its organization's contribution to international energy law is currently mainly through the service of the ECT, one of the very few multilateral treaties exclusively devoted to energy, and thus a key element of international energy law. By supporting negotiations for an energy transit protocol, the Energy Charter organization is also directly involved in the emergence of new, and very relevant international energy law. As energy markets integrate regionally and globally, the role of transport, transit and inter-connectors becomes much more important than it was in a period when most energy industries were segregated into national areas.

5 International Atomic Energy Agency (IAEA)

The IAEA is the one universal agency dealing with the peaceful use of nuclear energy. It has played a vital role in international nuclear security, and a minor, if at all, role in the development and application of nuclear power.[36] It was established by treaty, effective in 1957 – one of the few instances of a successful East-West collaboration during the Cold War.[37] Seated in Vienna, with a staff of over 2,000, a budget of over US$300 million[38] and the usual set-up (general conference, board of governors and headed by a Director-General), it is not much known outside the specialized nuclear community and has, as yet, not been exposed to the anti-nuclear movement in any significant way.[39] As a universal organization (related to the UN as such, but not a specialised UN agency in the narrow sense), it is used by Western countries for purposes of controlling nuclear risk in the developing, and now former Communist countries, but it has to co-exist (with some underlying competitiveness) with the specialized nuclear agencies of the OECD countries (OECD Nuclear Agency, *infra*) and EURATOM, the EU's special nuclear agency.[40]

The IAEA original mandate included *inter alia*:

- Research on the peaceful use of nuclear energy including scientific and technical information exchange and training;
- The safeguards system to ensure nuclear materials are not diverted to military purposes; and
- Setting of safety standards.

Over the years, the main functions have been standard-setting and the safeguards system. Its main task now is to safeguard the use of nuclear materials and facilities in member countries under the Non-Proliferation Treaty (Art. III deals with IAEA verification), but also in non-NPT countries (e.g. India, Pakistan and Israel,

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36 I am grateful for comments to Dr Norbert Pelzer, Goettingen; Dr Nathalie Horbach, Amsterdam; Prof. William Walker, St Andrews; and Ms J. Macdonald, British Energy.

37 An excellent survey of the history of its conception is: N. Pelzer, in R. Wolfrum (ed), *UN: Law, Politics and Practice*, London 1995; N. Horbach, "The International Atomic Energy Agency", in *International Encyclopaedia of Laws*, Intergovernmental Organisations, Suppl.3 (October 1998).

38 The IAEA has over the last 15 years been relatively starved for cash, part of the general policy of Western countries to curtail funding to the universal international agencies. This has, arguably, not been a very wise policy as the IAEA's core functions – nuclear safety, controls over trade in nuclear materials and disciplines on non-proliferation have become, even before 9/11/2001, more acute than ever, both in the context of the collapse of the ex-USSR nuclear industries, acquisition of nuclear power (for peace and for war) by developing countries and the threat of nuclear terrorism. It is assumed that the Al-Qaeda attack on New York in 2001 will reverse that trend.

39 This is arguably so because the security functions of the Agency, setting of security standards, control on nuclear materials trade and non-proliferation have been largely supported by the anti-nuclear movement. The IAEA has also never taken a strong position in favour of establishing more nuclear power capacity.

40 The EURATOM treaty, essentially governing nuclear materials transfers within and into the EU, was concluded in 1957.

although most of their facilities are kept outside the reach of IAEA safeguards).[41] The nuclear powers emerging in the Cold War encouraged non-nuclear powers into the IAEA and NPT treaty system. Based on special bilateral agreements with the state, the IAEA carries out monitoring of facilities to ensure safety – in terms of operational standards, but also in terms of non-proliferation. The non-proliferation issue has become relevant not only in relation to states (as the Iraqi efforts to build secretly a nuclear arms industry),[42] but also in relation to illegal trade in nuclear materials and weapons from state to state and possibly to terrorist groups. With, in 2002, the security threat by terrorists to nuclear installations seen in a much more acute light, many of the future high-priority IAEA activities are likely to focus on nuclear security, both with respect to defence against attacks on nuclear installations and with respect to terrorist threats to build and use small-scale nuclear explosives against civilian targets.[43]

Apart from non-proliferation (which has now a significance for "rogue states" and smaller states keen on nuclear weaponry i.e. not countries that are too big for international pressuring such as China, India), the IAEA is to develop and help apply technical standards and guidelines for nuclear plant safety, waste disposal and decommissioning of nuclear plants. The IAEA has here, like most specialized agencies, no direct regulatory powers, but has a major, if not the most dominant influence on regulation by national agencies with direct regulatory powers. For those, in particular from smaller countries, it would be inefficient to replicate the amount of effort in information-gathering, consultation and best-practices definition that goes into IAEA standard setting. In a material, though not formal, way the IAEA therefore acts as a global nuclear regulatory agency. The standard-setting activities are the most relevant for nuclear operators. Standard-setting is preceded by extensive information-gathering, including the "International Nuclear Information System" (INIS) for scientific literature. Reactor safety protection and radiation protection are implemented through "Operational Safety Review Teams" assessing specific nuclear power plants; the "Operational Safety Indicators Programme" providing for plant-specific safety indicator and the "Incident Reporting System" which reports on incidents in nuclear power plans.

Standard-setting includes protection norms and guidelines, including Regulations for the Safe Transport of Radioactive Materials; this forms the basis of all international transport conventions and national implementing legislation. The IAEA also develops Nuclear Safety Standards to standardize technical standards for establishment and operation of nuclear reactors. There is also a Code of Practice on the International Transboundary Movement of Radioactive Waste (1990). The IAEA safety series sets out what is assumed to be best practice. It is very influential with competent national authorities. The Nuclear Safety Programme sets down international minimum standards for nuclear power plants. They are not directly legally binding, but can become binding through reference, voluntary acceptance or incorporation in IAEA technical assistance agreements or accession to the 1994 IAEA nuclear safety convention.[44]

The safeguarding activities is the third major, and currently very relevant, function. The IAEA carries out a large number of inspections of individual nuclear facilities and materials (over 2,000 usually per annum, depending on budgetary constraints). Several treaties (non-proliferation of 1968; Tlatelolco for Latin America; Rarotonga of 1985 for the South Pacific) oblige member states to submit to IAEA inspections. Bilateral safeguards agreement – now with most states – govern the details of the safeguarding inspections. It is hard to deny in these situations that the IAEA has acquired not only material, but also formal regulatory powers in such situations by delegation via treaty. Following the revelations of Iraqi efforts to build an atom bomb, the safeguards system was enhanced. Under the Additional Protocol (INFCIRC/540) to the NPD safeguards agreement (INFCIRC/153), the IAEA acquired greater and more immediate access to sites in NPT countries; state parties were obliged to disclose more information about their nuclear activities and installations. Ratification, though, has been relatively slow, much due to the US government's depreciation of multilateral arms control. With nuclear terrorism now threatening the US, this is likely to change. As other developing countries embark on major nuclear power programmes (e.g. Iran, China, Pakistan), they will be encouraged to accede to the Additional Protocol as a sign of good-will and to avoid "blacklisting" and other forms of sanctions. The IAEA has also an important role in nuclear trade control. Under the Nuclear Suppliers Guidelines, to which nearly all supplier countries subscribe, nuclear materials exported must be placed under permanent IAEA safeguards.

41 Note the International Atomic Energy Agency: draft model protocol to strengthen and improve the effectiveness and efficiency for the IAEA safeguards system, in (1997) 36 *ILM* 1232.

42 *See* UN Security Council Resolution 687 (1991); for reports of the Special Commission on Iraq: www.iaea.org

43 N. Horbach, O. Brown and T. Borre, "Terrorism and Nuclear Damage Coverage" (2002) 20 *JENRL* 231.

44 (1994) 33 *ILM* 151.

The IAEA provides technical assistance in matters of nuclear safety (out of voluntary contributions), but it is here in some competition with other agencies, e.g. the EBRD's programme on nuclear safety in Eastern Europe or the OECD/NEA.[45] EBRD is only involved in the Ukraine (Chernbyl Shelter Fund), Lithuania (Ignalina NPP closure), Bulgaria (Kozloduy upgrade/closure) and Russia (Rovno Unit 4 and Khmelnitsky Unit 2) under its Nuclear Safety Account. OECD/NEA is only involved in some advisory activities on emergency testing, technical aspects of power plants and a project in Russia.[46]

The IAEA is an institution born out of both the enthusiasm for peaceful uses of nuclear energy, and the anxiety about nuclear war (and later accidents of nuclear power plants) which prevailed in the Cold War; in fact, it represents one of the few results of positive collaboration between the two rivalling camps at this time. It has now to adapt itself to a post-Cold War world. Its use for the technical aspects of discipline against rogue states, nuclear newcomers and would-be states and finally nuclear terrorism is a contemporary function with a future. Similarly, by providing technical expertise on safety standards and decommissioning, it responds to the post-Chernobyl fears and to the still persisting, at least in central and northern Europe, opposition to nuclear power which probably dates from the Cold War. It has not attracted much attention from anti-nuclear groups. This is partly because such groups will regard the IAEA as vital to any future disarmament and disbanding of nuclear power project. The IAEA seems so far not to have been much involved in the debate, mainly in Europe, about nuclear power, with both the traditional hostility from the "green" movement, but also the fact that maintenance, in fact expansion, may be indispensable for the objective of at least coming close to the Kyoto targets for CO^2 emissions without lasting damage to Western countries' prosperity.[47] It also seems to have been largely kept out of regulatory and institutional reform for nuclear power plants in the transition countries, where the EU (in particular through accession arrangements) and EBRD have taken the lead. Should the nuclear option re-emerge, perhaps, through technological innovation with better solutions in particular for waste disposal and in light of the climate-change implications, then the IAEA might acquire a more important role to ensure that nuclear power is safely handled in countries with a weak economic, and thereby institutional and technical competence for managing the high risk. My view is that taking Kyoto seriously implies an expansion of nuclear power at least until the possibly quite remote time when renewable energy can substitute both for current coal and hydrocarbon-based electricity production.[48]

The IAEA has been a significant contributor to international nuclear law, in particular in the area of non-proliferation and safety of materials and installations, both by administering relevant treaties, servicing the negotiation of new multilateral treaties and protocols and the design of periodically reformed technical standards.[49] The IAEA was also the moving force in creating the Vienna Convention on Civil Liability,[50] but also the Brussels Convention on the Liability of Operators of Nuclear Ships, the Convention on Civil Liability for Maritime Carriage of Nuclear Materials, the Convention on Physical Protection of Nuclear Materials, the Convention on Early Notification of Nuclear Accidents, the Convention on Assistance in Case of Nuclear Accidents and the revised Vienna Convention on Civil Liability for Nuclear Damage. The Vienna Convention served as a model for the subsequently negotiated Paris Convention. Other agreements sponsored by the IAEA relate to radioactive waste, nuclear safety, radiation, emergency planning, safeguards and the nuclear liability agreements mentioned (with some involvement of the OECD/NEA) in the Paris and Brussels nuclear liability conventions.

There are other initiatives, such as a Fissile Material Cutoff Treaty, which have not got off the ground yet. The unilateralism of the US government has meant a halt or delay in many IAEA initiatives – at least before the 9/11/2001 attack on the US. It seems rather to have been pushed and used by Western countries when appropriate than exercising initiative and leadership in its areas. Perhaps, with more nuclear power capacity installed in developing countries, it may gradually acquire a larger role in the specific nuclear issues of

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45 N. Horbach, "Assistance Programmes of the IAEA to the CEEC/NIS" (1999) 17 *JENRL* 211; also, *Contemporary Developments in Nuclear Energy Law: Harmonising Legislation in CEEC/NIS* (1999), 439–468.

46 The TASPLAV project, concerning a Russian experimental facility where the reactor core material can be melted.

47 More detail: T. Waelde, *EU Energy Law*, 2003 (forthcoming) (chapter on energy and environment). *Also*, OECD Nuclear Energy Agency, *Nuclear Power and the Kyoto Protocol* (2002).

48 The contradiction between an environmental policy in favour of climate-change mitigation and the inherited and long-standing tradition of the environmental movement (with its origin in the 1950s anti-nuclear movement) of opposition to nuclear power is as yet mentally suppressed and will need to become open and exposed to rational debate. For comparative data on the effect of the various forms of energy production on climate change: OECD/NEA 2002, *supra*.

49 The IAEA also publishes regularly, in its "Legal Series," updated information and analysis on nuclear law. The Nuclear Law Bulletin, on the other hand, is published by OECD/NEA.

50 N. Horbach, Liability versus responsibility under international law, defending strict state responsibility for transboundary damage, Doctoral thesis, Leiden, 1996.

developing and transition countries. The potential of nuclear power to help achieve Kyoto targets, the safety of nuclear installations in countries with weak governance and the measures needed to counter the existing much more acute threat of nuclear terrorism seem to be the main future items on the IAEA agenda.

6 United Nations

The UN system consists of the UN proper with its various departments and other units and specialised agencies. Some of those, like the World Bank or IMO, are for practical purposes completely independent. Our survey can not do justice to the panoply of activities by the UN system, its main and secondary organs and many secretariat groups and specialized agencies. What follows is therefore rather a selection with comments than a systematic survey.

6.1 Climate Change Secretariat

For the energy industries, in particular the oil and gas industry, the one UN activity with most relevance is the UN Framework Convention on Climate Change with its secretariat in Bonn.[51] The fate of the Kyoto Protocol is not clear, with its specified caps on CO_2 and other relevant greenhouse gas emissions for industrialized (including post-Soviet) countries, unspecific good-will obligations on developing countries, introduction of emission trading and other emission reduction measures (CDM and JI) and absence of the US, the largest CO_2 emitter. But the negotiations held by the COP ("Conference of the Parties") towards implementing the Kyoto Protocol are likely to put pressure on governments, in particular within the EU and the EU accession countries, to favour renewable (and possibly later nuclear) electricity generation and reduce coal, and possibly later oil and then gas-based power generation and consumption in transportation. With US absence, there will also be a trade issue to the extent that implementation of the Kyoto mechanisms is likely to develop intra-corporate, national and international trade in emission rights, but also financing of joint implementation and the clean development mechanism (CDM);[52] it is hard to see how US companies, operating outside the Kyoto membership, can be full beneficiaries of the emerging trade in emission rights and equipment/services for climate-change management with a tension between free trade under the WTO agreements and restricted trade among the Kyoto member states.[53]

6.2 Compensation Commission

The political arm of the UN has had an involvement in oil and gas affairs through the UN Compensation Commission, instituted after the Gulf War to administer Iraqi liability for war damage, in particular large environmental and other damage to the oil production facilities in Kuwait[54] by Security Council resolutions 687 and 705 (1991) and 986 (1995). The UNCC was created in 1991 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait. A specified percentage of the revenue – currently 25% – from authorised Iraqi oil exports is earmarked for the compensation of damages resulting directly from the invasion of Kuwait by Iraq. Such damages are to include, according to the Security Council resolution, commercial losses, "environmental damage" and depletion of natural resources.[55]

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51 www.unfcc.org; J. Mitchell, *The New Economy of Oil* (2000), 222.

52 T. Wälde, "Contractual Architecture for the Kyoto Protocol," (1999) 8 *RECIEL* 168 (with I. Worika, M. Brown and S. Vinogradov).

53 B. Müller, "The Kyoto Mechanisms Linking Technology to Ratification," (2002) 36 *J. World Trade* 57. One needs to examine here the implications of Art. XXI (g) GATT and analogies to the role of regional economic integration organizations and the non-inclusion of international organizations in the WTO membership and obligation system.

54 R. Lillich (ed), *The United Nations Compensation Commission* (reviewed in (1996) 90 *AJIL* 532); a bibliography is published on: http://www.unog.ch/uncc/publicat.htm (1996); UN Compensation Commission, "Text of Well Blowout Claim" (1997) 36 *ILM* 1343.

55 There is no doubt that Iraq by far exceeded the right of extraction of a belligerent occupant. It seems to have carried out a large-scale destruction of the Kuwaiti oil industry installations: UN Compensation Commission, Governing Council, Doc S/AC.26/2001/16 of 22 June 2001, in particularly p. 65 re Kuwait (also contains an overview of the mandate, process and procedures of the UNCC. The issue is, if the belligerent occupant, with the right of usufruct, can continue to extract the "normal" amount of (technically depletable) hydrocarbon (or water) resources.

The UNCC is in form and name not a tribunal, but an administrative process set up to expedite claims.[56] One needs to bear in mind that the Commission received over 2.3 million claims. Practical and expedient justice was therefore the primary aim – different from the US-Iran Claims Tribunal (*supra*) where claims are still being litigated in depth. Most claims have been settled by 2002.[57] There have been decisions awarding very large amounts to Kuwait for damage to its oil installations, for oil extracted and environmental damage caused by oil spills. These have been subject to criticism of over-valuation, an issue that may be more problematic in view of the legal and financial resources available to Iraq to put its own position effectively. In practice, however, two things have transpired that, in the opinion of many, may vitiate this concern. First, at the Panels' direction, the Commission staff has taken an aggressive role in verifying the claims. As a result, the Commission sought and received significant budget increases to permit the legal and valuation staff to conduct thorough investigations of the circumstances of many of the commercial and environmental claims. Some claimants objected that the process was more intrusive than they would have experienced under most normal adversarial processes. Budget figures and the success rates for category E claims bear this out. Second, Iraq has had far more access than the Commission's designers anticipated. Iraq receives all claims submitted to the E1 (oil sector) Panel and is permitted to make its own submissions. In the larger claims, the E1 Panel has also held oral proceedings and has permitted Iraq to appear through counsel and argue the issues raised for decision. One should bear in mind that the panels only issue reports and recommendations – the final decision (not always the same) is made by the Governing Council. Reportedly, various governments, including Russia and France, used experts to review the E1 (oil-related) awards. On the other hand, participants of the process – inside and outside the UNCC – have also communicated to me that the Governing Council's decisions were intensely political, with only marginal adjustment of the procedures to afford to Iraq more than a mere formal opportunity to argue against in particular the valuations proposed by the UNCC's consultants.

The UN Compensation Commission practice should lead to international precedent for valuation of damage to the oil industry and oil-related environmental damages. The activity of the UNCC in the field of oil industry-related liabilities would merit deeper examination.[58] It is in my view regrettable that the impact of this significant precedent is somewhat weakened by the absence of full "due process" to the de facto defendant Iraq. The panels of the UNCC have reportedly, in response of such criticism,[59] made considerable efforts to stretch the existing rules to provide as much of a hearing to Iraq as possible.[60] Future litigants will cite them as examples of legitimate ways to address problems such as valuation of oil and gas losses. This is particularly so as there is not much direct precedent.

6.3 United Nations Development Programme

The UN Development Programme is the UN's main development funding programme, fed by voluntary contributions. While the main funding is allocated to each country according to a population/poverty factor and spent according to national priorities, UNDP also runs several energy-related programmes relating to small-scale energy development, development of renewable energies (mainly through the Global Environment Facility, GEF, jointly with the World Bank) and implementation of the Montreal Protocol by assisting developing countries to eliminate activities that contribute towards depletion of the ozone layer.[61] It is difficult to discern any appreciable effect on energy law in these activities; there will be occasional funding by UNDP – if it fits into country priorities – of technical assistance for legislative reform in the oil and gas or energy sector.[62]

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56 *See* the explicit statement on the UNCC website on "claims processing": "The Commission is thus neither a court nor a tribunal with an elaborate adversarial process. Rather, the Commission was created as a claim resolution facility that could make determinations on a large number of claims in a reasonable time. As such, the Commission operates more in an administrative manner than in a litigation format. The Commission's claims processing procedures were prescribed by the Security Council and were further elaborated by the Governing Council…"

57 For detailed reference to the various UN SC resolutions, the various claims types and claims processing methods: www.unog.ch/uncc/clmsproc.htm

58 Mr Loftis is planning to write a comment for the JENRL (2003).

59 I have raised such criticism at the 1999 Geneva Global Arbitration, not to everybody's satisfaction.

60 Communication by Mr Loftis, former legal staff of the UNCC.

61 Website: www.undp.org; H. Sahlmann/Blank, UNDP, in R. Wolfrum (ed), *UN: Law Policies and Practice* Vol. 2 (1995), 1287.

62 I was responsible, from 1981 to 1991, as UN interregional adviser on mineral, petroleum and investment law, for providing direct assistance in legislative reform, institutional strengthening and investment negotiations funded directly by the then UN regular programme, but also fund-raising and managing advisory projects through UNDP. From all accounts, this advisory assistance as a focused, coordinated and high-profile specialised "business unit" has largely disappeared, though it is still sporadically carried out by *ad hoc* projects by UN/ESA, UNDP, UNIDO and UNCTAD. For an overview of general energy projects undertaken by UNDP, *see* http://www.undp.org/seed/energy/unise/appendix.html

The UN/UNDP in technical and financial assistance in the energy sector is, apart from the inevitable special attention for Kyoto and Montreal Protocol issues (renewable energy; ozone layer), not in any particular way focused on energy and certainly not on energy law. The significant developments in the energy industry over the last decade – privatisation, liberalisation and post-privatisation economic regulation – seem to have passed the UN system almost un-noticed. This is probably because the World Bank (for transition economies in some competition with EBRD) has taken leadership and "ownership" of these issues, but also because the UN system has had trouble modernizing its internal culture, outlook (and staff), all bogged down like old generals in the philosophy of the NIEO, with little substantial contact with industry, banks or modern market-oriented thinking. Multilateral development funding has also been declining, and UNDP projects have shifted from the "harder" topics of energy to the topics which are more fashionable in the UN discourse, that is poverty eradication, human rights, women and sustainable development. In competition with the World Bank, the UN system has not been able to capitalise on its competitive advantage – greater sympathy for and trust by developing countries and (somewhat) greater independence from the US – to develop concepts that are both in tune with the modernization of formerly state-oriented economies and less ideological than the philosophies which the Western-dominated institutions – World Bank, EBRD and OECD – have imposed with rigour and purity, but also with less realism, practicality and critical judgement – on developing and post-soviet countries in the 1990s. It is both easy to speculate on the UN's role in the energy sector and difficult to prove anything, since there is no independent assessment. Like all other international agencies, information and competence for critical assessment are divorced and self-assessment generally amounts to a mixture of propaganda and paraphrase of formal remits and in my view mostly fallacious if not even sometimes fraudulent reports on own successes.[63] From the accounts available, the UN activity appears diluted, ad hoc, not subject to systematic independent assessment in terms of cost-effectiveness and with little, if any, lasting impact. This may be due partly to the organization's mode of operation and heavy bureaucratic processes, but also due to the fact – relevant for any provider of technical assistance – that aid may not be the most effective method to upgrade economic and energy competencies in countries which are seriously underdeveloped, in institutional, structural, governance and cultural terms. Aid, to put it directly, in principle does not work where there is no absorptive capacity and culture.

6.4 United Nations Environment Programme

The UN Environment Programme in Nairobi is mandated to develop a global approach to environmental issues of sustainable development. As all UN organizations, it organizes training workshops for disseminating state-of-the-art know-how to developing countries, conferences to identify key issues and develop policy recommendations and technical assistance to help developing countries to adopt modern policies. There is some focus on incorporating environmental considerations into energy planning. More of interest for international energy law is UNEP's work providing administrative support – including for the negotiation of subsequent protocols – to international treaties – such as the Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol, the Basel Convention on hazardous waste transport and the UNFCCC. These, while not directly "energy law", have at times a tangential impact on, in particular, the oil industry.

UNEP, though, has never been fully accepted as the lead agency on global environmental challenges and the global community's policy response. As part of the UN system, it suffers from the lack of political and technical credibility throughout Western countries and international companies; major activities in its field are carried out by the Global Environment Facility rather than UNEP or the UNFCCC secretariat in Bonn. The "greening" of the World Bank under its president Wolfensohn has simultaneously reduced the need of Western countries for a UN institution in the environment field. Different from some of the accepted specialized agencies – seen as in practical terms fully independent and professionally very competent – UNEP has not achieved such status. It is rather covered by the negative view from which most of the standard UN activities suffer – conferences, constant organizational restructuring and the making of ever more pious resolutions. A significant contribution to energy law – though not international or national environmental

63 A. Seck, Oil and Gas Finance in the former Soviet Union, PhD thesis, CEPMLP/Dundee, 1995/96 has demonstrated in a particular case – claims for investment activation through agency funding – how most of the success claims, if properly assessed, turn out to be misleading. I had to compile from about 1985–1990 annual success claims for UN technical assistance in energy/resources. These turned out in the end to be mainly claims about causing large-scale investment when our activity was merely a marginal companion added on to some bigger project for which we then claimed creatorship. I am therefore convinced that most self-assessment in international agencies is generally misleading, and sometimes fraudulent.

law[64] – has, so far, been absent. That may differ, though, if UNEP's current efforts to promote guidelines on best practices with respect to environmental disclosure in the oil industry develop. Here, UNEP has stepped into the middle of non-conventional international energy law evolution by authoritative international and internal corporate guidelines.

In summary, energy is not treated well in the UN system. Its political appeal has been overshadowed by the great popularity of environmental and now human rights activities which offer the chance to develop mutual benefits for both NGOs and the UN system to help each other to more political legitimacy. Energy is not only one of the most significant nuts-and-bolts issues of economic development, inter-country trade, but also a core element of sustainable development and climate change. With energy, after liberalisation and privatization, developing from a mostly mere country issue to a great opportunity for mutual benefits from transnational trade, developing countries seem to gain less from this potential as their institutional framework and inter-country politics are in most cases discouraging energy trade.[65]

There is a case for a specialised UN agency dealing with energy matters, both in terms of monitoring world developments, linking with other issues (environment, transport, nuclear, shipping, climate change), developing policy proposals for a global negotiating agenda (where really needed), relating with industry and providing technical assistance in technical, institutional and regulatory areas. Such an agency would only work satisfactorily if it were not part of the UN system as such, but rather a professionally competent specialized agency. It should be organized with considerable input from both industry and competent NGOs and professional associations, i.e. rather in the way the IMO, IAEA, IEA and WTO are set up than a general UN department with its inevitable slack and wastage.

7 OECD Nuclear Energy Agency (NEA)

The NEA is a specialised agency integrated (much more closely than the IEA) into the OECD, though with some internal operational autonomy and directly under the Nuclear Energy Steering Committee, a subcommittee of the OECD Council. The 28 Members comprise the OECD countries, with some exceptions (Poland, New Zealand); they account for 85% of the world's installed nuclear energy capacity. Its main functions relate to research, data collection and the information exchange relating to the peaceful use of nuclear power, in particular safety of operations, transport of nuclear materials, workers' protection and waste management. In the past, the NEA managed nuclear operations directly. It works in the areas of nuclear safety and regulation; nuclear energy development; radioactive waste management; radiological protection and public health, nuclear law and liability, nuclear science and data collection related to the nuclear industry.

The NEA also has a proto-regulatory role by preparing decisions of the OECD to its member states in the area of operational safety of nuclear plants, severe nuclear accidents and radioactive waste disposal. Its own guidelines and standards are recommendatory, i.e. not legally binding. It works here through the Committee on Nuclear Regulatory Activities, the Committee on the Safety of Nuclear Installations and the Radioactive Waste Management Committee; these bring together the national nuclear authorities. Different from the IAEA, it does not carry out safeguard inspections. Its relations are mainly with the nuclear authorities in member countries. As in all other international agencies, there is a connection between its primary network function and the identification of "best practices" arising out of the technical dialogue and regulatory comparison. The NEA also functions as a channel to transpose radiation protection norms developed by the International Commission on Radiological Protection into OECD decisions. A process of revision of the 1990s radiological protection recommendations is currently under way. There has been, in 1998, an evaluation of the NEA. The principal recommendations have been to incorporate sustainable development into its conceptual framework; to integrate better with the broader energy-policy perspectives of the IEA and to develop a better collaboration with the IAEA based on complementarity and through an agreement and to accept new members, in particular with major nuclear operations, but also to avoid duplication, in particular in the area of technical assistance. It is not certain that the inherent organizational logic and self-interest of the NEA will allow such cooperative strategies to be implemented – inter-agency cooperation is usually recommended by external advisers that agencies only pay lip-service to it; the reality is usually inter-agency competition for interesting projects, funding, public profile and organizational mandates, with often large-scale duplication.[66]

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64 Note the references to the legal support and advisory activities in UNEP in its 2000 Annual Report.

65 T. Wälde, "Access to Energy Networks: A Precondition for Cross-border Energy and Energy Services Trade", CEPMLP internet journal and (with A. Gunst) now published in (2002) 36 *J. World Trade* 191.

66 On inter-agency relations (with a primary international law perspective), *see* C. Tietje, "Global Governance and Inter-Agency Co-operation in International Economic Law" (2002) 36 *J. World Trade* 501.

One of the NEA functions is to develop and disseminate information on nuclear law. The objective is greater harmonisation. It has carried out technical assistance on nuclear law reform (including nuclear liability in case of accidents) in Eastern Europe and Asia, usually in collaboration with the EU and the IAEA. It publishes the – authoritative – Nuclear Law Bulletin and has compiled several analytical/comparative studies on nuclear law in its member countries and Eastern Europe.[67] It also runs a professional training programme on nuclear law with the University of Montpellier. Finally, the NEA services the Paris Convention on third-party liability in the field of nuclear energy and the Brussels Convention complementing it.[68] The NEA also collaborates with non-member countries (particularly in the former Soviet Union) in the area of nuclear law.

Different from the IAEA (which has real regulatory powers), or the EU (which has real money for technical assistance), one should consider the NEA again rather in the club-model of the OECD: a forum for exchange and therefore dissemination and improvement of best nuclear regulatory practices. From the anti-nuclear perspective, the NEA is not necessarily an adversary: its emphasis on nuclear safety – including its work on decommissioning of nuclear plants – fits as well with an anti-nuclear perspective. There is no record that "civil society" so far has included the NEA in its group of top evil forces driving globalisation – such as the World Bank, the IMF and the WTO. NEA has in the past not taken much of a position in the debate over the continued justification of nuclear power. But with its most recent study on the link between greenhouse gases, climate change and nuclear power,[69] it has identified in detail the contribution that nuclear power makes – and can make – to achieving the Kyoto targets. It demonstrates that nuclear power is responsible for virtually zero CO_2 emissions – quite different from the large to very large CO_2 emissions from coal, oil and gas consumption in power plants. Given the current debate about nuclear power – with opposition from traditionally anti-nuclear NGOs, and support based on its pro-Kyoto impact, one should expect the NEA to continue to be a significant, if not vital function, in the very specialised field of nuclear law and regulation. It is somewhat squeezed between the globally oriented IAEA – which will now be mobilized to counter the terrorist threat to nuclear installations, and the politically and financially much more weighty EU Commission. But the NEA should provide a currently very desirable bridge for nuclear dialogue between the EU (and its accession countries) on the one hand and the US/North America and the Asian-Pacific regions on the other. Non-state actors opposed to nuclear energy are not represented in the NEA committees which therefore function largely as expert groups dominated by governmental and industry expertise. A "neutral" or "objective" view can therefore not be expected – but rather an informed partisan position in the debate on nuclear power.

8 European Union (EU)

The EU is not an international agency, but a persona under international law that is situated between a supranational organization and a federation of states.[70] The "energy law" it produces is therefore both part of international energy law and the internal, domestic energy law of both the Union and, through direct effect and implementation by national law, of the member states.[71] The EU has, among all international organisations, been the most active producer of energy law over the last 15 years, primarily in the design and implementation of its target, an integrated energy market. This development is now in full motion, including implementation in member states, but far from completion. The EU is also a most interesting case to watch: its energy law is a pilot exercise for creating integrated energy markets in other regions (e.g. North America; South America and the Americas; Asia-APEC; around Russia). It is also the dominant model in spheres of intensified economic cooperation of the EU (accession countries; Eastern Europe, CIS; Mediterranean) where there is now a legal obligation and a de facto pressure to adapt the single market instruments. Finally, the energy integration methods and experience of the EU provide an example of energy (and wider economic) integration in the global economy. It is the world's laboratory for ways to create integration benefit out of opening up national, hitherto largely segregated markets for cross-border investment and trade, for

67 *See* the contributions by Horbach, Brands and Reyners (focusing on NEA cooperation) in N. Horbach, *Contemporary Developments in Nuclear Law* (1999).

68 The text of the conventions is available at: http://www.nea.fr/html/law/legcom.html. The NEA Steering Committee may recommend the exclusion of nuclear installations or materials from the operation of the Paris Convention.

69 http://www.nea.fr/html/ndd/reports/2002/nea3808.html

70 Each of the European Communities, EC, EURATOM and ESC (expiring in 2002) has its own legal personality. The "European Union" combines the European Communities plus, established by the Treaty of EU ("Amsterdam Treaty"), the foreign and security policy, justice and home affairs "pillars." The Council can authorise the Presidency to negotiate agreements with third parties binding the EU. The EU's formal legal status is therefore as with many EU matters unclear, perhaps one could qualify it as a "partial and budding international legal person."

71 In detail: T. Wälde, *EU Energy Law and Policy* (2003); M. Roggenkamp *et al.*, *EU Energy Law* (2001).

identification of the obstacles which have been overcome – and which have not yet been overcome, including the current – cultural, institutional and political – limits to integration and for the new challenges, in particular environment and climate change, and ways how to deal with them. The EU is therefore at this time the most relevant precedent case, not necessarily for instant copying, but for identifying challenges, issues, policy instruments and their likely impact (including resistance to them). The importance of the EU as the global economy's laboratory for modern, post-privatisation energy law as an instrument of economic and environmental regulation in emerging integrated energy markets cannot be over-estimated.

In terms of organizational structure, the European Commission is both the conventional secretariat servicing the Treaties (Treaty of Rome and Amsterdam, Euratom and ECSC), but also an independent actor with co-legislation, regulatory and enforcement powers. In terms of political weight, it is the driver of integration policies, setting the agenda, organizing the process of information, consultation and coalition building. Energy competence is located mainly in DG TREN (ex-DG XVII, single energy market, Synergie), but energy-related competencies are also exercised by DG Competition, DG Environment and the directorates – in particular DG Relex (ex-DG I) handling international assistance and foreign affairs (e.g. the TACIS and Phare Programmes). The Council represents the member states and the intergovernmental facet of the EU.

The European Court of Justice (ECJ) is the most influential and active international court. It has been instrumental in developing key notions of EU law going beyond the intergovernmental character of international treaties and developing the EC/EU into something between a supranational organization and a federal state, mainly through the concepts of supremacy and direct effect of EU law, and by a mostly integration-oriented and rather policy- than letter-based interpretation of EU law. It has, though, been reticent to decide on matters which would require a large-scale industrial restructuring and establishment of a regulatory system as in the 1997 case on various EU member states' energy import/export monopoly.[72] In these cases, the Court has observed "regulatory restraint" and rather waited for the negotiations for new energy directives led by the Commission to achieve their result.

The European Parliament has been acquiring greater powers in the legislative process and some influence over the Commission; its weakness, like the European Commission, is that it has quite limited political acceptance and legitimacy as a truly European society prevailing over nation states has as yet not developed.[73] On the other hand, it is not correct to argue that the European institutions have no democratic legitimacy, but are just appointed bureaucracies. Like in any nation state in the EU, legitimacy is based on institutional procedures whereby the decision by voters is mediated and channelled through elected representatives; the appointment of the President of the Commission and thereby the Commissioners rely on both the properly elected EU Parliament and properly elected national governments. It is just that societies in Europe are, culturally, linguistically and emotionally still primarily (though no longer exclusively) national societies rather than integral elements of an overarching "European society." The formal flow of democratic legitimacy from the national "bottom" to the EU institutions exists reasonably well, but its mediation above the national level does not yet instil the confidence and political acceptance as is the case with national institutions. This analysis is significant for understanding the dynamics of the EU institutions since they will often be more motivated than national governments mainly acting through and with political parties to seek additional public acceptance through pursuing involvement of important social forces (professional and industry associations and NGOs) and bend often too easily to prevailing (and usually fickle) public moods.

The new EU energy law can not be compared to conventional international public law which deals now mainly with, firstly, division of proprietary and regulatory jurisdiction, and secondly, with the existing quite general, unspecific and indirect impact of many, often not yet ratified international conventions, on the energy industry. EU energy law has a quite different goal: it is aimed primarily at restructuring the institutional and legal foundation of national energy industries so that a truly EU-wide energy industry can gradually emerge, while at the same time introducing on the Community- and member-state level a more level playing field with respect to environmental regulation and initiatives towards reducing greenhouse gas emissions. It is part of the global paradigm of privatization and liberalization. This entails dismantling of existing monopolies and barriers to cross-border trade, providing the legal basis for competitive markets and finally nudging the industries towards real competition. It is the legal form of a proactive, rather than reactive, industrial restructuring in the EU energy industries.

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72 *Commission v. France et al.*, (1997) ECR I, 5699, 5879, 5815 and 5865.
73 J. Weiler, "The Transformation of Europe" (1991) 100 *Yale L.J.* 2403.

EU energy law consists primarily of the EU treaty and its key general provisions (Art. 28–31; 49, 50; 81, 82, 86 and 87) for freedom of movement and controls on anti-competitive conduct as applied specifically to energy situations on one hand, and, on the other, on a series of directives, chief among them are the 1996 Electricity and the 1998 Gas Directives. There is no separate chapter or policy in the EU Treaty on energy (though it has often been advocated),[74] but only some references (Arts. 3 (u), 154, 174 to natural resources and environment, 175) of only marginal significance. Since energy is one of the most strategic industries, one can both argue that an energy chapter is desirable, but also that energy is automatically covered and included as a key component in any reference to industry, commercial and economic affairs. The energy directives are being implemented by the member states (and by the East European accession states based on "Europe agreements"), with perhaps still a too large diversity. Primary law could have been used to dismantle the export and import monopolies and provide third-party non-discriminatory access to the "essential facilities" of electricity and gas transport, storage and distributions systems owned mainly through monopoly, but there was not enough political will and power in the Commission; too much resistance from member states and the energy monopolies and no green light from the European Court of Justice.[75]

Supported by the leverage of the theoretical applicability of the articles of the EU Treaty, large industrial consumers and economic liberal opinion, the Commission exercised considerable, and successful leadership in developing an agenda which combined the – commonly accepted – single market imperative with – much more controversial – liberalization of national energy industries. The key issue in all of the debates and in the final directive (and subsequent implementation process) was, first, the lifting of energy trade monopolies (national as in France or regional as in the German case) and, second, an obligation of the owners of natural monopolies (transport, storage and distribution) to provide non-discriminatory access at reasonable conditions to competitors. This process is as yet not completed. The practical implementation is proving difficult until the economic interest of the owners of these natural monopolies is no longer to support their own energy business, but rather the maximisation of their transport business ("ownership unbundling"). This stage is not yet reached. The approach of the directives is to provide for gradually diminished thresholds of "eligibility" for access rights, such eligibility being defined as to reach targets for relative market openings over time. Current initiatives aim at facilitating cross-border trade by preventing prohibitive transport tariffs and by creating mechanisms for coordination of electricity dispatch over connected systems.

These liberalization initiatives have been accompanied by now emerging measures for compliance with the EU's Kyoto targets for greenhouse gas emissions by promotion of energy efficiency and renewable energy sources (RES). These will in turn require compatibility with the EU's rules on state aids (which are responsive to renewable energy and other truly environmental goals), transparent and non-discriminatory procurement and EU-wide trade. Other significant measures have been the obligation of state – and private – energy utilities and oil and gas licensees to procure in a transparent and non-discriminatory way, i.e. to abstain from formal or informal protectionism ("Utilities directive"), a duty on member states to issue oil and gas exploration and development licences in a similar transparent and non-discriminatory way, i.e. exclude preference for domestic companies or companies with a desired domestic procurement record ("Licensing Directive").

The EU, however, does not only produce "internal" energy law, but it also participates actively, though in a still inchoate form, in "general" international energy law.[76] The gradually coalescing "federal" character, with its tension between necessary, unitary negotiating and deal-making competence towards the outside world and the maintenance of such elements of national sovereignty by member states makes the EU a particularly awkward, indecisive and contradictory international actor.[77] It is now recognised, based on several authoritative ECJ decisions that the EU has exclusive competence in trade matters, e.g. WTO negotiations, but only

74 C. Egenhofer and G. Goy, "Europaeische Energiepolitik vor der Regierungskonferenz 1996/97," *in Viertelsjahreshefte fuer Wirtschaftsforschung*, Vol. 65, 368 (1996).

75 In its October 1997 judgement on export/import monopolies, the ECJ essentially told the Commission it had to restructure the existing regime by negotiated and agreed upon specific directives, and not by ad hoc actions focusing on specific issues in the much more complex sequence of energy operations endorsed by the Court. The Court in essence declined political responsibility for such restructuring and mandated the Commission to seek a negotiated – and thereby accepted and easier to implement – solution. *Commission v. France et al.*, Case C157-160/94.

76 For more detail, see forthcoming chapter on "International Dimension of EU Energy Law," in T. Wälde, *EU Energy Law and Policy*, 2003.

77 Comment by R. Holbrooke, "Some advice from a friend: time to shape up," Financial Times; Apr 17, 2001.

"mixed" competence in "investment matters" (e.g. GATS, TRIPS, ECT, MAI).[78] There is no explicit competence for the EC to enter into treaties relating to energy matters in the EC Treaty, so that trade, investment and other powers are relied upon, and usually in the form of joint EC/member states accession. The result is that the EU is very slow and inflexible to react and is therefore at a disadvantage in international negotiations where decisiveness and clarity are required.[79] The EU is very dependent on import of primary energy sources, in particular oil (apart from the UK), gas (apart from Netherlands, Denmark and UK).[80] This important dependence, coupled with the fact that most energy sources are in volatile regions close to the EU (Russia, Central Asia, Caucasus, Algeria and other Mediterranean countries; Middle East/Gulf countries, Angola and Nigeria), with political insecurity in these countries spilling over to the EU in terms of security of supply, but also domestic political disruptions (terrorism; volatile situation of ethnic minorities from these countries; unwilling, but inevitable implication of the EU in the US/Israel-Arab conflict). But a unitary and focused EU action is here impeded by numerous special interests by its member states: UK and French relation with its former colonies, German sensitivity to anything endangering peaceful relations with its Eastern neighbours, Norwegian special status as non-EU member, but more or less subject to EU energy law via the EEA agreement (and a major, and stable oil and gas supplier), UK's "special relationship" with the US and French "special" competitiveness in political and cultural affairs with the US. EU actions are also influenced by the opaque relationship with the US. The EU needs the US as senior partner, in particular for security measures where the EU can usually not act decisively nor employ effective security forces, but there is also an underlying tension, both out of economic competition, some resentment (in particular France) at US hegemony and much greater linkage of the EU to various countries and social, political and religious forces in its greater neighbourhood.

The most visible success of the EU is the Energy Charter Treaty; here, the EU has managed its probably most visible tangible success in being essential in moving a 52-countries plus EC investment, trade and transit treaty to legal effectiveness and implementation.[81] The ECT is not legally "owned" by the EU, but the EU is its major financial and political sponsor. The treaty's transit article 7 is now being developed into a specific energy transit protocol which reflects the EU's interest in facilitating diversified supply of energy (oil, gas and perhaps electricity) in particular from the oil and gas prospective countries now making up the former Soviet Union.[82] The Treaty, though, has not been followed, as was the original negotiating mandate, by a "supplementary agreement" dealing with access for investors and privatisation (though a full-text draft exists). The Treaty is now of increasing interest to countries outside its original sphere (East-West Europe); for OPEC countries, it would be a multilateral treaty where they would not have to face US obstruction.

Other noted instruments have been the "Europe agreements" with the East European accession states; these oblige the accession states to transpose EU law (including energy law and the new directives) within a time span into their national system.[83] There is a focus on developing "trans-European energy networks" (i.e. pipelines, transmission grids, interconnectors) and other current priorities of the EU in the energy sector: promotion of renewable energy, compliance with Kyoto obligations and nuclear safety of the problematic safety standards of nuclear reactors in Eastern Europe. The accession countries are under considerable pressure – as weaker, EU-entry seeking parties – to adopt the EU "acquis communautaire", i.e. the current state of EU energy law. On the other hand, while they will be pressured to adopt this "acquis" in the making of which they have had no influence, they are not likely to benefit from the liberalization of the EU if powerful domestic interests of domestic member states are affected. There is, for example, considerable reluctance – and search for legitimate reasons, mainly based on environmental pretext – to provide for free energy imports into the EU from Eastern Europe. But this is the nature of the relative bargaining power – seekers to join a club have to accept its rules, without being certain that their presence is universally welcome.

As regional and global energy markets develop, competition law becomes more relevant and no longer exempt for these industries. Access to essential facilities, prohibition of long-term sales contracts with exclusivity features and an anti-competitive effect are the main issues. While there is a EU-US agreement on

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78 Opinion 2/92 of 1995 – relying on Art. 133 (ex 113) and, before signature of the WTO agreement, Opinion 1/94, also relying on Art. 133 (ex 113); for a thoughtful and interesting comment: W. Shan, "Towards a Common EC Policy on Investment Issues" (2001) 2 *J.W.I.* 603.

79 Holbrooke and Peel, *Financial Times*, 17 April, 2001. The Holbrooke criticism is only partly justified. As something between a federal state and a supranational organization, such slowness is unavoidable.

80 EU Commission, Green Paper on Security of Supply, November 2000; J. Stern, *EU Security of Supply and Gas* (2001).

81 T. Wälde (ed), *The Energy Charter Treaty* (1996); C. Bamberger, J. Linehan and T. Waelde, "Energy Charter Treaty in 2000: in a New Phase" (2000) 18 *JENRL* 331.

82 www.encharter.org; R. Liesen, "Transit under the Energy Charter Treaty" (1999) 17 *JENRL* 59.

83 EU Commission "Enlargement and International Relations," www.europa.eu.int/comm/enrgy_transport_2_en.html

administrative collaboration in competition law, there is so far no truly international competition law – with some exception based on the non-discrimination and competition good-will clause in the Energy Charter Treaty.[84] But the way competition law is now applied to energy issues is by extraterritorial application of either US or EU (or US and EU) competition law to events and situations which may take place outside the EU/US territory, but which have a substantial impact within them.[85] *Faute de mieux,* extraterritorial regulation by major economies will be the only way to exercise some control over anti-competitive practices in the energy industry. EU competition law, naturally, is applied within the EU, but also through the EEA agreement, in particular now directed at Norwegian practices.[86] The EU's major energy suppliers – Norway, Algeria, Russia – are now challenged by EU competition law: destination clauses (i.e. clauses which forbid the further sale of supplied gas) and other exclusive features of long-term contracts are questionable under EU competition law, but they may be necessary, at least in an initial phase, to provide a solid foundation for long-term investment in expensive infrastructure (mainly pipelines and related facilities). The rules of third-party access – existing under Art. 82 of the Treaty and the two energy directives (96 and 98) can cause difficulties to the commercial viability of new infrastructure being established, with financing based on long-term contracts with a predictable cash flow. A compromise is here necessary, and apparently in the offering. The approach to solve these problems is not conceptually difficult. In essence, projects require for an initial period greater leeway from EU competition law which can gradually expand its scope as the investment is made and recouped. But it requires, as usual in the EU, complex intra-departmental political bargaining for which the Commission seems famously slow. The EU-Russia energy dialogue ("Prodi-Putin dialogue"), while so far apparently largely without substantive result,[87] will have to include a EU-Russia deal where the extraterritorial impact of EU competition law on long-term gas supply contracts is pushed back, EU-backed financing for energy infrastructure (pipelines, interconnectors) either directly provided or at least legally and institutionally facilitated; the Russian contribution has to be ratification of the Energy Charter Treaty, collaboration with its transit protocol. For the EU, the proper strategy for its energy security concerns is to develop a firm, high-level and legally well-anchored institutional structure with all of its major suppliers – and this includes both OPEC countries, Russia and the Caspian countries. The chief condition for success of such deals is that the Commission should speak with a coordinated voice and that promises made are deliverable by the organization.

A significant influence by the EU on energy law, in particular in transition countries, is exercised through the Tacis (former USSR), Phare (Eastern Europe) and Synergie (energy-focused) development assistance programmes.[88] These programmes have funded, throughout the 1990s, advisory assistance on policy, legislative and institutional reform in the energy sector in virtually all transition countries. They have been most effective in the accession countries, both for reasons of greater cultural receptivity and the added pressure of accession requirements formulated in the Europe agreements. In the CIS-states these projects have helped to secure ratification of the ECT (but not by Russia as yet) and have had otherwise a more mixed result. No independent assessment is available, though there are doubts about the most effective method of organising such assistance and the ease of persuading governments to undertake energy policy reform desired by the EU. At times, there have also been overlaps, such as the EU Commission's support for the Energy Charter Treaty's emerging new transit protocol, but also, through different units, for a pipeline agreement proposed by the EU INOGATE project. EU financial assistance in the energy sector is probably the largest programme around in terms of grant money, but not the leading one in terms of reputation for expertise, focus and efficiency.[89]

The major direction of current EU involvement in international energy law is through the Kyoto process (*supra*). The EU has become the main promoter and sponsor of the Kyoto Protocol setting targets on greenhouse emissions, and this role has increased with the exit of the US. It is not dissimilar from the way the

84 T. Wälde and P. Wouters, "State Responsibility in a Liberalised World Economy: State, Privileged and Subnational Authorities under the 1994 Energy Charter Treaty, An Analysis of Articles 22 and 23" (1996) 27 *Neth Ybk Int lL* 143.

85 M. Broberg, "The European Commission's Extraterritorial Powers in Merger Control, Gencor v. Commission" (2000) 49 *ICLQ* 172.

86 D. Buchan, "Norway rebuts Brussels charge of fixing gas contracts," Financial Times September 11, 2001.

87 www.europa.eu.int/comm/energy_transport/en/lpi_en3.html review the discussions for a "EU-Russia partnership". It mainly identifies possible commonalities of interest (omitting existing conflicts of interest) and issues, but does not yet identify what the contours of a negotiating package ("deal") could be.

88 111 T. Wälde , *EU Energy Law and Policy* (2003), ch. 8 (forthcoming); information from the EU websites: http://www.europa.eu.int/comm/energy_transport/en/enlarg_2_en.html

89 My own experience, which is affirmed by most other consulting firms, is that bilateral agencies are much more efficient, less politicized, less transaction-cost generating than EU services – and this includes, from a very practical point, also a reputation for proper payment procedures.

Energy Charter Treaty has moved to completion, with the EU pushing and the US exiting. The strong position taken in the Kyoto-process reflects the EU's comparatively greater domestic interest in environmental matters than the US. One of the reasons is that, first, the European Parliament has a sizeable representation of "green party" members and that the EU Commission, as an international agency searching for making up for its low level of political legitimacy, is more responsive to pressures from environmental NGOs. Parallel to Kyoto, the EU has also been promoting tighter measures against marine pollution, mainly by using port state leverage (*supra*), influencing the OSPAR convention committee towards full prohibition of off-shore decommissioning of oil platforms, participating in all relevant international conventions with an at least tangential impact on energy industry operations, issuing a number of directives mandating environmental impact assessment for power plants and developing systems of eco-labelling measuring, *inter alia*, energy efficiency of appliances.[90]

8.1 EURATOM

EURATOM,[91] a separate treaty, but fully integrated into the Community institutions and managed by the Commission, was the EC's early response to the need to develop and monitor safety systems for nuclear energy materials. It was originally premised on the 1950s enthusiasm for the "peaceful use of nuclear energy," fears over security of supply of oil and a supply-sharing system for uranium. None of these factors present at the origin of EURATOM is present today – except to some extent the security of supply aspect. EURATOM's original objectives were frozen during the early decades by conflicts with France which wanted to see EURATOM deployed to develop an exclusively European (i.e. not US-linked, and largely French-influenced) nuclear industry.

Nuclear industry is in the EU (in particularly outside France and the Southern member states) an embattled industry. Austria has closed down its nuclear industry; Sweden and Germany are engaged in a slow process towards closing and decommissioning. The future of these processes can, however, not be predicted with any certainty as the enthusiasm for the Kyoto Protocol and the opposition to nuclear industry are difficult to square. If nuclear industry is on the wane, then the future task of EURATOM will be decommissioning and safe storage of used nuclear materials. If nuclear industry re-emerges, then safety rules, rehabilitation of East European nuclear power plants and management of nuclear waste will be priorities. The new threat from terrorism will also pervade European nuclear law. There will be a tightening of rules of nuclear safety (installations, materials). The implication of a successful or almost successful terrorist attack on a European nuclear installation are hard to predict; the consequence could be an acceleration of the trend towards closure – or a much greater investment in security.

EURATOM develops safety norms, supports research, cooperates closely with industry, scientists and other international organisations (in particular the IAEA and OECD/NEA) and can invest in projects including the right to raise loans for that purpose. Nuclear research constitutes one of the major components of Commission-funded research.[92] EURATOM produces through the Community institutions directives, regulations and administrative decisions. It is given the right to own nuclear materials within the EU. It runs a system of safeguarding for nuclear materials (excepting those for defence purposes) within the EU. Like its sister organizations (IAEA, OECD/NEA), EURATOM has managed to keep largely out of the limelight of public opposition to nuclear. Its specialized, technical character, its generally endorsed focus on nuclear safety and its absence from public debate over nuclear energy should have helped. That may have helped the nuclear activities of the European Commission to have a more comfortable life, but it is not certain that retreat from challenge and debate has served either these organizations nor the issue of nuclear energy. As organizations with special knowledge of nuclear industry, and most extensive networks, the EURATOM service of the Commission (as the IAEA and OECD/NEA) should have developed a position to be able to make informed arguments about nuclear energy and highlight in the public eye both the risks, but also the particularly newly emerging benefits in terms of climate change. At present, the Commission's nuclear services have taken a more active role in the debate on nuclear industry: they stress the climate change/Kyoto target and security of supply advantages of nuclear energy; they currently propose a much deeper engagement

90 T. Wälde , *EU Energy Law and Policy* (2003) (forthcoming), environmental chapter.

91 H. Donndorf, "Nuclear Treaties, Euratom and Beyond," in *IBA/SERL Proceedings of its 1996 Prague conference*; http://europa.eu.int/comm/energy/nuclear/index_en.html

92 The current nuclear-related EU Commission research budget is over 1.2 billion Euro from 2002–2006; loans available to fund rehabilitation of East European nuclear reactors should exceed two billion Euro.

with the safety-wise problematic nuclear reactors in Eastern Europe and improved safety standards and safeguard procedures.

Its function of safeguarding nuclear materials will only increase as international terrorism develops increasing sophistication and will inevitably try to utilise nuclear materials. Here, though, the main risk of leakage of nuclear materials, equipment and expertise is likely to be in countries with run-down nuclear establishments and weak systems of governance. The EURATOM service of the Commission as well as the IAEA and OECD/NEA are likely to gain more prominence as they will have to serve as international instruments to deny access to nuclear power to terrorist organizations.[93]

In summary, the EU is currently, in spite of its many and deep institutional weaknesses, the one supranational organization with the most visible impact on national energy laws (mainly in accession, transition and many developing countries), the main laboratory for economic regulation of cross-border energy trade and investment under the current paradigm of environment-friendly post-privatisation liberalization, but also the main sponsor of major international energy initiatives, mainly the Kyoto Protocol and the Energy Charter Treaty. International energy law can no longer be seriously studied without understanding both the internal and external dimension of EU energy policy. It is likely to progress at a tortoise pace pushed away from conventional energy (coal, oil and gas) by the new emphasis on renewable energy sources, but on the other hand still, and for all the foreseeable future, dependent on strategic oil and gas imports from highly insecure producing countries. It has not yet been able to grapple with its major energy dilemma: a large part of the EU's energy demands is covered by nuclear energy. Nuclear electricity is currently and for the foreseeable future, together with large hydropower, the only substantial energy source which is not responsible for greenhouse gas emissions. The EU's 2000 Security of Supply Green Paper and subsequent reports make this clear, but simultaneously there is no political leeway for the EU to strongly promote maintenance, and expansion of nuclear power until the green movements in the EU have made a choice between their traditional opposition to nuclear energy, based on the risk of accidents and disposal of nuclear waste, on the one hand and the indubitable fact that nuclear energy is among the currently relevant energy sources the most Kyoto-friendly one. Should the re-orientation of subsidy and support lead to a true upsurge of non-nuclear renewable energies, then this dilemma might fade, but if it does not, then there seems to be no choice about either embracing, vigorously and expansively, nuclear again or forgetting about control of greenhouse gases.

9 Conclusions

All international agencies have at their core a "cross-border network" function: they bring "colleagues" together, typically from a ministry with a similar regulatory and operational task. There is a secretariat which acts to organize the network, its – typically very formalized – gatherings and provide permanent expertise (mainly of a comparative nature). This function is not often perceived so clearly, but it may be the vital function of the organization. The network now increasingly includes, often relegated to a lesser rank in communication priority, non-state actors: non-government, commercial, professional organizations and consultants. If the agency does not have direct regulatory powers (they rarely do), the "network" nevertheless exercises considerable influence over national and international energy law: it identifies best (or at least prevailing and current) practices. These provide a persuasive and practical blueprint for national regulation. Experiences are discussed, models taken home or brought to the "club" meetings. Copying other people's work and working off legal precedent has always constituted the practical core of the legal profession.

The much more formal and directly "legal" focus of international agencies work revolves around their respective treaties. The secretariats service the treaties, the governmental delegates negotiate (with low-profile secretariat influence) such treaties and then "implement" them at home. It is only in the EU, a hybrid between an international organization and a federated country, that the international authorities (Commission, Council, Court) have some direct regulatory powers.

Different from human beings who grow largely along the lines of a genetic programme, international organisations mutate: they come with a fixed mandate, the organizational constitution which seems at the beginning to be written in stone. But all agencies here surveyed have developed quite differently; some parts of their original mandate have become obsolete and dead text, others have been developed and new mandates have been effectively acquired, often based on bold re-interpretations of the original terms of reference. The OECD and its predecessor started out to manage the Marshal Fund; it is now the major intergovernmental

93 *See* forthcoming article by N. Horbach/Brown in (2002) 20 *JENRL* 231.

policy think-tank on any subject that moves governments. The World Bank started off as a financing agency for reconstruction in Europe after WWII – it sees itself now as the "premier development institution." The IAEA started off to encourage nuclear power, it is now mainly an institution to develop and enforce disciplines relating to nuclear risk, by accident, mismanagement or terrorism. What they lack is a natural death. It is very hard to make an obsolete international agency disappear; it – its leaders, staff, clients and constituency – will cling to life, sometimes with (self-) deception over its continued usefulness, often with a desperate attempt to latch on the currently fashionable paradigm so that criticism against the agency can be presented as criticism of the current high-ground moral values. International agencies seem to adapt more easily in form and substance. They re-baptise readily what they have always done and will continue to do in the fashions of the day – they are much better at re-designing their public relations than what they do and how they do it. Probably every organisation examined is in some way or other seriously out of date, mainly with respect to its internal structure and organisation. They should all be modernised – in my view towards more professional competence, but also inclusion of non-state actors in their formal decision processes. Their funding – almost exclusively by government contribution (e.g. national taxes) – is also in need of review. More dependence on the value of services rendered in a more competitive situation would make them more modern, responsive and efficient. Some of them – e.g. OPEC or the IEA – were borne out of a particular crisis which no longer exists in this form; here, adaptation has been particularly difficult and modernization particularly pressing. But as intergovernmental organizations they are mainly controlled by diplomats, themselves removed from elections, politics, competition and markets so that the need for modernization is delayed by a double wall of insulation.

There is a considerable difference between two types of international agencies: the general ones (primarily the UN, also to some extent the OECD) are mainly "talking-shops". They do not have a very specific and certainly very little or no regulatory or operational focus, but they serve to accommodate the public concerns and themes of the day, to process them into organisational language of some (though in reality much less than is claimed) authority. This is an important function as they conduct a public dialogue, albeit in very stilted form, about "global politics." The weaker the nation state, and the greater pressure for public participation, now expressed on the international level mainly by the NGOs, the more is there a need for a "parliament" in the original sense, i.e. a "talking-shop". Not surprisingly, general international agencies have found it least problematic to accommodate the pressure of NGOs for involvement. Both actors look for legitimacy – and reciprocal recognition of legitimacy helps both. They operate politically in symbiosis. The problematic legitimacy of both is less of a problem as the operational impact is minimal – even international treaties emerging are typically neither legally effective (because not ratified) nor, even if ratified, specific enough to make a difference.

Very much in contrast to the more discursive and symbolically acting international organisations are technically specialised and focused agencies. Here, specific regulation emerges, either sometimes directly when delegating such powers to an international agency seems inevitable, or in the form of standards and guidelines which are then used by national authorities by reference, incorporation or copying. These are the agencies which have most influence on the specific content of international energy law. Their advantage is a professional network and culture, great competence through specialisation and direct significance in their field of play. On the other hand, such agencies typically are "captive," i.e. they operate for the benefit and through the participation of specific industries. They will only very grudgingly open up to challenges brought from the outside into their well fortified citadels. "Civil society" has left these agencies largely in peace and focused on the "talk-shop" and the most prominent agencies – the Globalisation Triad of World Bank, IMF and WTO. In practical terms of influencing the rules for the global energy economy, this strategy is wrong. It is mainly in the specialised agencies that specific and effective rules are made. This rule-preparation or rule-making activity cannot be influenced much by scoring significant rhetorical successes in UN forums.

My conclusion is that both the international agencies and the manifold actors within "civil society" need to open up to each other, in a professional way. There is a good reason for "civil society" to be present in the talk-shop forums. But there is also the temptation that NGOs and such agencies continuously run like lemmings into the same, regularly changing fashionable direction, scoring successes that do not count. I suggest that there is a good reason for the specialised, and practically influential, international organisations to open up, not just formally, and not only by being more transparent, but by effectively allowing formal representation of non-state actors on their governing boards. Multinational companies now have sometimes representatives from public-interest organisations and academia on their boards. Intergovernmental organisations are a child of the club of nation states. Such adjustment to a world where governments do not play exclusively and where many non-state actors are now significant actors is difficult for international organisations and their nation-state governors. Even if non-state actors now compete with governmental actors on

the global scene, it is difficult for the places where governments still call the tune, to yield a part of their formal power. But I suggest this is nothing but to accommodate to the changing reality of global society. How to do it is much more difficult. NGOs, for example, are mainly self-appointed, with weak governance, transparency and accountability. Commercial companies, their associations and professional groupings, on the other hand, are better structured and in a formal sense more easily identifiable. In principle, international organisations should gradually co-opt those who represent power – commercial , financial , political and public-opinion – into their governing structures. Similarly, treaty negotiations should, as the OECD debacle with the MAI has shown,[94] incorporate in a much more active sense those who have power and a voice in the field. There are inchoate precedents: the ILO tripartite system of decision-making (itself child of the 1950s corporatist world-view), the meek OECD, BIAC and TUAC (largely it seems lunch opportunities for retired functionaries). But these need to be developed, experimented with and at the end formalised. There is no reason why those with a powerful voice — Greenpeace, Shell, the ICC or the International Bar Association — should not be able to be part of the directorium of international organisations and part of the treaty negotiators whose consensus is necessary. From "civil society" this would require a sea-change in attitude: from a merely critical, destructive and political-campaigning attitude to a position where constructive alternatives have to be designed, bargained for and where positive responsibility and accountability for results (not just for criticism) has to be accepted.

International agencies now fulfil a vital role for the proper functioning of the global economy – as designed in the Bretton Woods discussions in 1944. They help to provide rules, institutions and stability to facilitate the transnational commercial and financial transactions. All criticisms of them by "civil society" have not shown any constructive alternative. But they are also now held accountable for the ills of the world – the defects of globalisation. There is very much the need for clearly identified scapegoats here at play. Most of the ills of the world existed before international agencies emerged. Poverty is nothing new. But in response to these accusations – and in some cases because this is their original or newly acquired mandate (e.g. the World Bank), such international organizations now take "economic development" as their prime task. I doubt that the underlying philosophy of much of the "development industry" has ever been properly reflected on and debated. In essence, the idea that by development aid one can help "underdeveloped" countries become "developed countries" (using the periodically changing catch-words ruling the agency rhetoric for a time), assumes that it is practical and possible to fundamentally change the nature of a society by well-thought out and largely funded external intervention. I suggest there is very little evidence that such global social engineering actually can work. Countries which have developed rapidly tend to have a cultural, institutional and geographical make-up that favours prosperity. Countries which have maximised foreign aid (e.g. Tanzania) have often not developed at all. Aid, providing investment capital (and then later loan forgiveness) seems overall to have little correlation with development, and certainly much less than both the agency and "civil society" rhetoric (including rock singers' intervention) loudly proclaims. The aid industry naturally advocates the usefulness of aid – would they not? My impression – after three decades of work with development aid practically and intellectually – suggests that there is an organic combination of culture, law, institutions, geographical condition, political system – which decides at the end over who becomes prosperous and who not.[95] Agencies which acquire for themselves both a role in facilitating transactions in the global economy plus the task of "eradicating poverty" set themselves, in my view, an impossible – though possibly well-funded task. At best, an agency can help on the margins to support what is already developing and to help to create framework conditions in the global economy that help those who are able to help themselves. The rest is rather a global welfare task.

This scepticism towards global social engineering also informs my view on international law-making. I suggest it is much more preferable to let rules develop organically and spontaneously out of the social and commercial intercourse of the commercial operators – and use legislation rather to codify for greater clarity's purposes rules that already exist than to use rule-making to "change the world" in a voluntaristic way. Voluntaristic law-making tends not to work. If it goes against the grain of what the main actors expect, want, already practise and accept, it will remain law on the books, but not law in action.[96] "Directing" economic actors against their will only promises failure – facilitating their action, on the other hand, is the only way to

94 E. Graham, *Fighting The Wrong Enemy: Antiglobal Activists and Multinational Enterprises* (2000).

95 Relying on W. Easterly, op. cit.; also Francis Fukuyama Trust, *The Social Virtues and the Creation of Prosperity* (1995); M. Olson, *Power and Prosperity* (2000); J. Sachs, "Nature, nurture and growth", Economist, June 14, 1997, 22–24; D. Landes, *The Wealth and Poverty of Nations* (1998).

96 I have developed this approach in more depth: T. Wälde , "Non-Conventional on Effectiveness" (1999) 4 *Austrian Review of International & European Law* 164.

effectiveness. The international scene is dominated currently so much by rhetoric, by pretend-rules and pretend-actions instead of an appreciation of what it takes to help and nudge change gradually along.[97]

Finally, this survey of the role of international agencies with a focus on energy law and policy has also persuaded me that we are in the middle of a process of formalizing power relationships over weakly governed, underdeveloped countries which is reminiscent of (though certainly not identical with) the colonialism of the 19th century. Then, the power of the state, the wealth of the investors and the values of the missionary movements propelled European states to control a large part of the world. Today, the formal trappings of statehood and sovereignty are everywhere. But "soft" and "structural" power is exercised by the rich societies through their NGOs – reborn 19th century missionaries, through their multinational companies, through their – controlled and funded – international agencies and through the legal, financial, educational and cultural tools of exercising influence and co-opting elites – rather than outright formal ownership as in the past. The treaties and their subsidiary tools now being used to impose "good governance" on less civilised societies tend all to be formal at face value, but asymmetric in substance and actual practice. They are all directed towards telling underdeveloped countries and their governments what to do – but rarely, in practice, do they target the rich countries.

I am surprised that these phenomena are not perceived more generally – so either I am wrong, or too much chained to analogies in the past, or I see something that is as yet taking shape before it can be more scientifically interpreted. Institutionalized systems of power are not *per s*e evil. They are a societal method to regularize, institutionalize and even discipline the exercise of brute power and therefore they form part of civilization. Camouflaging such exercise of power in noble concepts may serve a purpose, and perhaps sometimes a good one. But should it not be the scientist's responsibility to call a spade a spade and see the naked emperor under his imagined clothes?

97 "Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-Action and the Management of Environmental Investment Risk," in Friedl Weiss *et al*., (eds), *International Economic Law with a Human Face* (1998), 223–271.